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COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE FOURTH.

BY

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER THE FIRST.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

WE are now arrived at the fourth and laſt branch of theſe commentaries; which treats of *public wrongs*, or *crimes* and *miſdemeſnors*. For we may remember that, in the beginning of the preceding volume [a], wrongs were divided into two ſpecies; the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the ſubject of that entire book: we are now therefore, laſtly, to proceed to the conſideration of public wrongs, or crimes and miſdemeſnors; with the means of their prevention and puniſhment. In the purſuit of which ſubject I ſhall conſider, in the firſt place, the general nature of crimes and puniſhments; ſecondly, the perſons capable of committing crimes;

a Book III. ch. 1.

thirdly, their ſeveral degrees of guilt, as principles or acceſſories; fourthly, the ſeveral ſpecies of crimes, with the puniſhment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and ſixthly, the method of inflicting thoſe puniſhments, which the law has annexed to each ſeveral crime and miſdemeſnor.

FIRST, as to the general nature of crimes and their puniſhment: the diſcuſſion and admeaſurement of which forms in every country the code of criminal law; or, as it is more uſually denominated with us in England, the doctrine of the *pleas of the crown;* ſo called, becauſe the king, in whom centers the majeſty of the whole community, is ſuppoſed by the law to be the perſon injured by every infraction of the public rights belonging to that community, and is therefore in all caſes the proper proſecutor for every public offence [b].

THE knowlege of this branch of juriſprudence, which teaches the nature, extent, and degrees of every crime, and adjuſts to it it's adequate and neceſſary penalty, is of the utmoſt importance to every individual in the ſtate. For, (as every great maſter of the crown law [c] has obſerved upon a ſimilar occaſion) no rank or elevation in life, no uprightneſs of heart, no prudence or circumſpection of conduct, ſhould tempt a man to conclude, that he may not at ſome time or other be deeply intereſted in theſe reſearches. The infirmities of the beſt among us, the vices, and ungovernable paſſions of others, the inſtability of all human affairs, and the numberleſs unforeſeen events, which the compaſs of a day may bring forth, will teach us (upon a moment's reflection) that to know with preciſion what the laws of our country have forbidden, and the deplorable conſequences to which a wilful diſobedience may expoſe us, is a matter of univerſal concern.

IN proportion to the importance of the criminal law, ought alſo to be the care and attention of the legiſlature in properly

[b] See Vol. I. p. 268.

[c] Sir Michael Foſter, pref. to rep.

forming

forming and enforcing it. It ſhould be founded upon principles that are permanent, uniform, and univerſal; and always conformable to the dictates of truth and juſtice, the feelings of humanity, and the indelible rights of mankind: though it ſometimes (provided there be no tranſgreſſion of theſe eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occaſional neceſſities of the ſtate which it is meant to govern. And yet, either from a want of attention to theſe principles in the firſt concoction of the laws, and adopting in their ſtead the impetuous dictates of avarice, ambition, and revenge; from retaining the diſcordant political regulations, which ſucceſſive conquerors of factions have eſtabliſhed, in the various revolutions of government; from giving a laſting efficacy to ſanctions that were intended to be temporary, and made (as lord Bacon expreſſes it) merely upon the ſpur of the occaſion; or from, laſtly, too haſtily employing ſuch means as are greatly diſproportionate to their end, in order to check the progreſs of ſome very prevalent offence; from ſome, or from all, of theſe cauſes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I ſhall not here enter into any minute inquiries concerning the local conſtitutions of other nations; the inhumanity and miſtaken policy of which have been ſufficiently pointed out by ingenious writers of their own [d]. But even with us in England, where our crown-law is with juſtice ſuppoſed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties leſs uncertain and arbitrary; where all our accuſations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by ſuch of his equals, againſt whom he can form no exception nor even a perſonal diſlike; —even here we ſhall occaſionally find room to remark ſome particulars, that ſeem to want reviſion and amendment. Theſe have chiefly ariſen from too ſcrupulous an adherence to ſome rules of the antient common law, when the reaſons have ceaſed upon which thoſe rules were founded; from not

[d] Baron Monteſquieu, marquis Beccaria, &c.

repealing ſuch of the old penal laws as are either obſolete or abſurd; and from too little care and attention in framing and paſſing new ones. The enacting of penalties, to which a whole nation ſhall be ſubject, ought not to be left as a matter of indifference to the paſſions or intereſts of a few, who upon temporary motives may prefer or ſupport ſuch a bill; but be calmly and maturely conſidered by perſons who know what proviſions the laws have already made to remedy the miſchief complained of, who can from experience foreſee the probable conſequences of thoſe which are now propoſed, and who will judge without paſſion or prejudice how adequate they are to the evil. It is never uſual in the houſe of peers even to read a private bill, which may affect the property of an individual, without firſt referring it to ſome of the learned judges, and hearing their report thereon [e]. And ſurely equal precaution is neceſſary, when laws are to be eſtabliſhed, which may affect the property, the liberty, and perhaps even the lives, of thouſands. Had ſuch a reference taken place, it is impoſſible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciouſly) the mound of a fiſhpond, whereby any fiſh ſhall eſcape; or to cut down a cherry-tree in an orchard [f]. Were even a committee appointed but once in an hundred years to reviſe the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be ſeen for one month in the company of perſons who call themſelves, or are called Egyptians [g] *(a)*.

IT is true, that theſe outrageous penalties, being ſeldom or never inflicted, are hardly known to be law by the public:

[e] See Vol. II. p. 345.

[f] Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.

[g] Stat. 5 Eliz. c. 20.

(a) [But now by ſtatute 23 Geo. 3. c. 51. it is enacted as follows: "Whereas an act made in the fifth year of the reign of "queen Elizabeth, intituled, An act for further puniſhment of "vagabonds calling themſelves Egyptians, is and ought to be "conſidered as a law of exceſſive ſeverity, be it therefore enacted, &c. that from and after the firſt day of Auguſt 1783, the "ſaid act ſhall be, and the ſame is hereby repealed."]

but

but that rather aggravates the miſchief, by laying a ſnare for the unwary. Yet they cannot but occur to the obſervation of any one, who hath undertaken the taſk of examining the great outlines of the Engliſh law, and tracing them up to their principles: and it is the duty of ſuch a one to hint them with decency to thoſe, whoſe abilities and ſtations enable them to apply the remedy. Having therefore premiſed this apology for ſome of the enſuing remarks, which might otherwiſe ſeem to ſavour of arrogance, I proceed now to conſider (in the firſt place) the general nature of *crimes*.

I. A CRIME, or miſdemeſnor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and miſdemeſnors; which, properly ſpeaking, are mere ſynonymous terms: though, in common uſage, the word "crimes" is made to denote ſuch offences as are of a deeper and more atrocious dye; while ſmaller faults, and omiſſions of leſs conſequence, are comprized under the gentler names of "miſdemeſnors" only.

THE diſtinction of public wrongs from private, of crimes and miſdemeſnors from civil injuries, ſeems principally to conſiſt in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, conſidered merely as individuals; public wrongs, or crimes and miſdemeſnors, are a breach and violation of the public rights and duties, due to the whole community, conſidered as a community, in it's ſocial aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in poſſeſſion of the land: but treaſon, murder, and robbery are properly ranked among crimes; ſince, beſides the injury done to individuals, they ſtrike at the very being of ſociety, which cannot poſſibly ſubſiſt, where actions of this ſort are ſuffered to eſcape with impunity.

IN all cafes the crime includes an injury: every public offence is alfo a private wrong, and fomewhat more; it affects the individual, and it likewife affects the community. Thus treafon in imagining the king's death involves in it confpiracy againft an individual, which is alfo a civil injury; but as this fpecies of treafon in it's confequences principally tends to the diffolution of government, and the deftruction thereby of the order and peace of fociety, this denominates it a crime of the higheft magnitude. Murder is an injury to the life of an individual; but the law of fociety confiders principally the lofs which the ftate fuftains by being deprived of a member, and the pernicious example thereby fet for others to do the like. Robbery may be confidered in the fame view: it is an injury to *private* property; but were that all, a civil fatisfaction in damages might atone for it: the *public* mifchief is the thing, for the prevention of which our laws have made it a capital offence. In thefe grofs and atrocious injuries the private wrong is fwallowed up in the public: we feldom hear any mention made of fatisfaction to the individual; the fatisfaction to the community being fo very great. And indeed, as the public crime is not otherwife avenged than by forfeiture of life and property, it is impoffible afterwards to make any reparation for the private wrong: which can only be had from the body or goods of the aggreffor. But there are crimes of an inferior nature, in which the public punifhment is not fo fevere, but it affords room for a private compenfation alfo: and herein the diftinction of crimes from civil injuries is very apparent. For inftance; in the cafe of battery, or beating another, the aggreffor may be indicted for this at the fuit of the king, for difturbing the public peace, and be punifhed criminally by fine and imprifonment: and the party beaten may alfo have his private remedy by action of trefpafs for the injury which he in particular fuftains, and recover a civil fatisfaction in damages. So alfo, in cafe of a public nufance, as digging a ditch acrofs a highway, this is punifhable by indictment, as a common offence to the whole kingdom and all his majefty's fubjects;

but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong.

UPON the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: *viz.* not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of these commentaries: but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. THE nature of *crimes and misdemesnors* in general being thus ascertained and distinguished, I proceed in the next place to consider the general nature of *punishments:* which are evils or inconveniencies consequent upon crimes and misdemesnors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemesnors[h]. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind;

[h] See Grotius, *de j. b. & p, l.* 2. c. 20. Puffendorf, L. of Nat. & N. b. 8, c. 3.

ſince all are by nature equal. Whereof the firſt murderer Cain was ſo ſenſible, that we find him[i] expreſſing his apprehenſions, that *whoever* ſhould find him would ſlay him. In a ſtate of ſociety this right is transferred from individuals to the ſovereign power; whereby men are prevented from being judges in their own cauſes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of puniſhing offences againſt the law of nature, that is now veſted in the magiſtrate alone; who bears the ſword of juſtice by the conſent of the whole community. And to this precedent natural power of individuals muſt be referred that right, which ſome have argued to belong to every ſtate, (though, in fact, never exerciſed by any) of puniſhing not only their own ſubjects, but alſo foreign embaſſadors, even with death itſelf; in caſe they have offended, not indeed againſt the municipal laws of the country, but againſt the divine laws of nature, and become liable thereby to forfeit their lives for their guilt[k].

As to offences merely againſt the laws of ſociety, which are only *mala prohibita*, and not *mala in ſe*; the temporal magiſtrate is alſo empowered to inflict coercive penalties for ſuch tranſgreſſions: and this by the conſent of individuals; who, in forming ſocieties, did either tacitly or expreſsly inveſt the ſovereign power with a right of making laws, and of enforcing obedience to them when made, by exerciſing, upon their non-obſervance, ſeverities adequate to the evil. The lawfulneſs therefore of puniſhing ſuch criminals is founded upon this principle, that the law by which they ſuffer was made by their own conſent; it is a part of the original contract into which they entered, when firſt they engaged in ſociety; it was calculated for, and has long contributed to, their own ſecurity.

THIS right therefore, being thus conferred by univerſal conſent, gives to the ſtate exactly the ſame power, and no more, over all it's members, as each individual member had

i Gen. iv. 14.

k See Vol. I. pag. 254.

naturally

naturally over himself or others. Which has occasioned some to doubt, how far a human legislature ought to inflict capital punishments for *positive* offences; offences against the municipal law only, and not against the law of nature; since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, their common ancestor and representative [l], "whoso sheddeth man's blood, by man shall "his blood be shed." In other instances they are inflicted after the *example* of the creator, in his positive code of laws for the regulation of the Jewish republic; as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature; as for forgery, for theft, and sometimes for offences of a lighter kind. Of these we are principally to speak: as these crimes are, none of them, offences against natural, but only against social, rights; not even theft itself, unless it be accompanied with violence to one's house or person: all others being an infringement of that right of property, which, as we have formerly seen [m], owes it's origin not to the law of nature, but merely to civil society.

THE practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, sir Matthew Hale [n]: "when offences grow "enormous, frequent, and dangerous to a kingdom or state, "destructive or highly pernicious to civil societies, and to "the great insecurity and danger of the kingdom or it's in-"habitants, severe punishment and even death itself is ne-"cessary to be annexed to laws in many cases by the pru-"dence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legislature in putting him to death that commits it.

l Gen. ix. 6.

m Book II. ch. 1.

n 1 Hal. P. C. 13.

It

It is not it's frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late empress Elizabeth, than under her more sanguinary predecessors? Is it now, under Catherine II, less civilized, less social, less secure? And yet we are assured, that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death: and the latter has, upon full persuasion of it's being useless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions[o]. But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded waggons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow, that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provisions of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never

[o] Grand instructions for framing a new code of laws for the Russian empire, §. 210.

justify

justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow-creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I WOULD not be understood to *deny* the right of the legislature in any country to enforce it's own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it: and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations that are given by the sovereign power.

2. As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the supreme being: but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut* "*poena* (as Tully[p] expresses it) *ad paucos, metus ad omnes* "*perveniat*;" which gives rise to all ignominious punishments, and to such executions of justice as are open and

[p] *pro Cluentio*, 46.

public:

public: or laſtly, by depriving the party injuring of the power to do future miſchief; which is effected by either putting him to death, or condemning him to perpetual confinement, ſlavery, or exile. The ſame one end, of preventing future crimes, is endeavoured to be anſwered by each of theſe three ſpecies of puniſhment. The public gains equal ſecurity, whether the offender himſelf be amended by wholeſome correction, or whether he be diſabled from doing any farther harm: and if the penalty fails of both theſe effects, as it may do, ſtill the terror of his example remains as a warning to other citizens. The method however of inflicting puniſhment ought always to be proportioned to the particular purpoſe it is meant to ſerve, and by no means to exceed it: therefore the pains of death, and perpetual diſability by exile, ſlavery, or impriſonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences; or from the perpetration of ſome one crime of deep malignity, which of itſelf demonſtrates a diſpoſition without hope or probability of amendment: and in ſuch caſes it would be cruelty to the public, to defer the puniſhment of ſuch a criminal, till he had an opportunity of repeating perhaps the worſt of villanies.

3. As to the *meaſure* of human puniſhments. From what has been obſerved in the former articles we may collect, that the quantity of puniſhment can never be abſolutely determined by any ſtanding invariable rule; but it muſt be left to the arbitration of the legiſlature to inflict ſuch penalties as are warranted by the laws of nature and ſociety, and ſuch as appear to be the beſt calculated to anſwer the end of precaution againſt future offences.

HENCE it will be evident, that what ſome have ſo highly extolled for it's equity, the *lex talionis*, or law of retaliation, can never be in all caſes an adequate or permanent rule of puniſhment. In ſome caſes indeed it ſeems to be dictated by natural reaſon; as in the caſe of conſpiracies to do an injury, or falſe accuſations of the innocent: to which we may add that

that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may, sometimes, be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered; by decreeing, in imitation of Solon's laws [q], that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepid assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict,

[q] Pott. Ant. b. 1. c. 26.

and tends most to the security of mankind; by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers[r], that the punishment due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. ch. 18. that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead[s].

But though from what has been said it appears, that there cannot be any regular or determinate method of rating the

r Beccar. c. 15.

s Stat. 38 Edw. III. c. 9.

quantity of punishments for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

As, first, with regard to the object of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the *king's* death is by the English law punished with greater rigour than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity; not because the intention is equivalent to the act itself; but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

AGAIN: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment is less penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwise)

of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime [t].

FARTHER: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness [v]: and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit: according to what Cicero observes [u], "*ea sunt animadvertenda peccata maxime, quae difficillime praecaventur.*" Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; in another it is only murder: to steal a handkerchief, or other trifle of above the value of twelve pence, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And, in the island of Man, this rule was formerly carried so far, that to take away an horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or a fowl, which is easily done, was a capital misdemesnor, and the offender was punished with death [w].

LASTLY, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due

t Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received. "I was abused, says he, by my enemy, "in cold blood, out of malice, not by "heat of wine, in the morning, publicly, before strangers as well as citi"zens; and that in the temple, whither "the duty of my office called me."

v Beccar. c. 6.

u *pro Sexto Roscio.* 40.

w 4 Inst. 285.

diſtinctions of ſeverity. It is the ſentiment of an ingenious writer, who ſeems to have well ſtudied the ſprings of human action [x], that crimes are more effectually prevented by the *certainty*, than by the *ſeverity*, of puniſhment. For the exceſſive ſeverity of laws (ſays Monteſquieu [y]) hinders their execution: when the puniſhment ſurpaſſes all meaſure, the public will frequently out of humanity prefer impunity to it. Thus alſo the ſtatute 1 Mar. ſt. 1. c. 1. recites in it's preamble, "that the ſtate of every king conſiſts more aſſuredly "in the love of the ſubject towards their prince, than in the "dread of laws made with rigorous pains; and that laws "made for the preſervation of the commonwealth without "great penalties are more often obeyed and kept, than laws "made with extreme puniſhments." Happy had it been for the nation, if the ſubſequent practice of that deluded princeſs in matters of religion, had been correſpondent to theſe ſentiments of herſelf and parliament, in matters of ſtate and government! We may farther obſerve that ſanguinary laws are a bad ſymptom of the diſtemper of any ſtate, or at leaſt of its weak conſtitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel puniſhments: the Porcian law, which exempted all citizens from ſentence of death, ſilently abrogated them all. In this period the republic flouriſhed: under the emperors ſevere puniſhments were revived; and then the empire fell.

It is moreover abſurd and impolitic to apply the ſame puniſhment to crimes of different malignity. A multitude of ſanguinary laws (beſides the doubt that may be entertained concerning the right of making them) do likewiſe prove a manifeſt defect either in the wiſdom of the legiſlative, or the ſtrength of the executive power. It is a kind of quackery in government, and argues a want of ſolid ſkill, to apply the ſame univerſal remedy, the *ultimum ſupplicium*, to every caſe of difficulty. It is, it muſt be owned, much *eaſier* to extirpate than to amend mankind: yet

x Beccar. c. 7.

y Sp. L. b. 6. c. 13.

that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed[z], that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same[a]: hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China; in preventing frequent assassination and slaughter.

YET, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament[b] to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders.

z Beccar. c. 6.

a Sp. L. b. 6. c. 16.

b See Ruffhead's index to the statutes (tit. felony) and the acts which have since been made.

I The

The injured, through compaſſion, will often forbear to proſecute: juries, through compaſſion, will ſometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compaſſion, will reſpite one half of the convicts, and recommend them to the royal mercy. Among ſo many chances of eſcaping, the needy and hardened offender overlooks the multitude that ſuffer; he boldly engages in ſome deſperate attempt, to relieve his wants or ſupply his vices; and, if unexpectedly the hand of juſtice overtakes him, he deems himſelf peculiarly unfortunate, in falling at laſt a ſacrifice to thoſe laws, which long impunity has taught him to contemn.

CHAPTER THE SECOND.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, confidered in general the nature of crimes, and punifhments, we are next led, in the order of our diftribution, to inquire what perfons are, or are not, *capable* of committing crimes; or, which is all one, who are exempted from the cenfures of the law upon the commiffion of thofe acts, which in other perfons would be feverely punifhed. In the procefs of which inquiry, we muft have recourfe to particular and fpecial exceptions: for the general rule is, that no perfon fhall be excufed from punifhment for difobedience to the laws of his country, excepting fuch as are exprefsly defined and exempted by the laws themfelves.

ALL the feveral pleas and excufes, which protect the committer of a forbidden act from the punifhment which is otherwife annexed thereto, may be reduced to this fingle confideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, fo neither can it induce any guilt: the concurrence of the will, when it has it's choice either to do or to avoid the fact in queftion, being the only thing

that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vitious will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.

Now there are three cases, in which the will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which

may be referred to the second; and compulsion or necessity, which may properly rank in the third.

I. FIRST, we will consider the case of *infancy*, or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever [a]. What the age of discretion is, in various nations, is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts: from seven to ten and an half was *aetas infantiae proxima*; from ten and an half to fourteen was *aetas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantiae proxima*, they were not punishable for any crime [b]. During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief: but with many mitigations, and not with the utmost rigour of the law [c]. During the last stage (at the age of puberty, and afterwards) minors were liable to be punished, as well capitally, as otherwise.

THE law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemesnors; so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences [d]: for, not having the command of his fortune till twenty-one, he wants the capacity to do those things, which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit) for these an infant, above

a 1 Hawk. P. C. 2.

b *Inst.* 3. 20. 10.

c *Ff.* 29. 5. 14. 50. 17. 111. 47. 2. 23.

d 1 Hal. P. C. 20, 21, 22.

the age of fourteen, is equally liable to ſuffer, as a perſon of the full age of twenty-one.

WITH regard to capital crimes, the law is ſtill more minute and circumſpect; diſtinguiſhing with greater nicety the ſeveral degrees of age and diſcretion. By the antient Saxon law, the age of twelve years was eſtabliſhed for the age of poſſible diſcretion, when firſt the underſtanding might open [d]: and from thence till the offender was fourteen, it was *aetas pubertati proxima*, in which he might, or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious ſtage of diſcretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be ſuppoſed innocent, of any capital crime which he in fact committed. But by the law, as it now ſtands, and has ſtood at leaſt ever ſince the time of Edward the third, the capacity of doing ill, or contracting guilt, is not ſo much meaſured by years and days, as by the ſtrength of the delinquent's underſtanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in theſe caſes our maxim is, that "*malitia ſupplet aetatem*." Under ſeven years of age indeed an infant cannot be guilty of felony [e]; for then a felonious diſcretion is almoſt an impoſſibility in nature: but at eight years old he may be guilty of felony [f]. Alſo, under fourteen, though an infant ſhall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could diſcern between good and evil, he may be convicted and ſuffer death. Thus a girl of thirteen has been burnt for killing her miſtreſs: and one boy of ten, and another of nine years old, who had killed their companions, have been ſentenced to death, and he of ten years actually hanged; becauſe it appeared upon their trials, that the one hid himſelf, and the other hid the body he had killed, which hiding manifeſted a conſciouſneſs of guilt, and a diſcretion

d *LL. Athelſtan.* Wilk. 65.
e Mir. c. 4. §. 16. 1 Hal. P. C. 27.
f Dalt. Juſt. c. 147.

to discern between good and evil[g]. And there was an instance in the last century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly[h]. Thus also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow; there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment[i]. But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

II. THE second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that "*furiosus furore solum punitur.*" In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself[k]. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged some-

g 1 Hal. P. C. 26, 27.
h Emlyn on 1 Hal. P. C. 25.
i Foster. 72.
k 3 Inst. 6.

thing

thing in stay of judgment or execution[l]. Indeed, in the bloody reign of Henry the eighth, a statute was made[m], which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M. c. 10. For, as is observed by sir Edward Coke[n], "the execution of an of- "fender is for example, *ut poena ad paucos, metus ad omnes* "*perveniat*: but so it is not when a madman is executed; "but should be a miserable spectacle, both against law, and "of extreme inhumanity and cruelty, and can be no example "to others." But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency[o]. Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our antient law, that persons deprived of their reason might be confined till they recovered their senses[p], without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts[q], a method is chalked out for imprisoning, chaining, and sending them to their proper homes.

III. THIRDLY; as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather

l 1 Hal. P. C. 34.
m 33 Hen. VIII. c. 20.
n 3 Inst. 6.
o 1 Hal. P. C. 31.
p Bro. *Abr. tit. corone.* 101.
q 17 Geo. II. c. 5.

than

than as an excuse for any criminal misbehaviour. A drunkard, says sir Edward Coke [r], who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit.* It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, says the president Montesquieu [s], drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that "he who committed a crime, when drunk, should receive "a double punishment;" one for the crime itself, and the other for the ebriety which prompted him to commit it [t]. The Roman law indeed made great allowances for this vice: "*per vinum delapsis capitalis poena remittitur* [u]." But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real) will not suffer any man thus to privilege one crime by another [w].

IV. A FOURTH deficiency of will, is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief happens

r 1 Inst. 247.
s Sp. L. b. 14. c. 10.
t Puff. L. of N. b. 8. c. 3.
u *Ff.* 49. 16. 6.
w Plowd. 19.

pens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour [x].

V. FIFTHLY, *ignorance*, or *mistake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action [y]: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law [z], as it was of the Roman [a].

VI. A SIXTH species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.

x 1 Hal. P. C. 39.
y Cro. Car. 538.
z Plowd. 343.
a *Ff.* 22. 6. 9.

1. OF this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigotted days of queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of it's merciless sister, persecution.

As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither a son or a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master [b]; though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will [c]. Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king

[b] 1 Hawk. P. C. 3.

[c] 1 Hal. P. C. 45.

Ina the Weſt Saxon[d]. And it appears that, among the northern nations on the continent, this privilege extended to any woman tranſgreſſing in concert with a man, and to any ſervant that committed a joint offence with a freeman; the male or freeman only was puniſhed, the female or ſlave diſmiſſed; "*proculdubio quod alterum libertas, alterum neceſſitas* "*impelleret*[e]." But (beſides that in our law, which is a ſtranger to ſlavery, no impunity is given to ſervants, who are as much free agents as their maſters) even with regard to wives, this rule admits of an exception in crimes that are *mala in ſe*, and prohibited by the law of nature, as murder and the like: not only becauſe theſe are of a deeper dye; but alſo, ſince in a ſtate of nature no one is in ſubjection to another, it would be unreaſonable to ſcreen an offender from the puniſhment due to natural crimes, by the refinements and ſubordinations of civil ſociety. In treaſon alſo, (the higheſt crime which a member of ſociety can, as ſuch, be guilty of) no plea of coverture ſhall excuſe the wife; no preſumption of the huſband's coercion ſhall extenuate her guilt[f]: as well becauſe of the odiouſneſs and dangerous conſequence of the crime itſelf, as becauſe the huſband, having broken through the moſt ſacred tie of ſocial community by rebellion againſt the ſtate, has no right to that obedience from a wife, which he himſelf as a ſubject has forgotten to pay. In inferior miſdemeſnors alſo, we may remark another exception; that a wife may be indicted and ſet in the pillory *with* her huſband, for keeping a brothel; for this is an offence touching the domeſtic oeconomy or government of the houſe, in which the wife has a principal ſhare; and is alſo ſuch an offence as the law preſumes to be generally conducted by the intrigues of the female ſex[g]. And in all caſes, where the wife offends alone, without the company or coercion of her huſband, ſhe is reſponſible for her offence, as much as any feme-ſole.

[d] *cap.* 57.
[e] Stiernh. *de jure Suen. l.* 2. *c.* 4.
[f] 1 Hal. P. C. 47.
[g] 1 Hawk. P. C. 2. 3.

2. AN-

2. ANOTHER species of compulsion or necessity is what our law calls *duress per minas*[h]; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemesnors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well-grounded; such, "*qui cadere* "*possit in virum constantem, non timidum et meticulosum*," as Bracton expresses it[i], in the words of the civil law[k]. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace[l]. This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences, so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person: this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent[m]. But in such a case he is permitted to kill the assailant; for there the law of nature, and self-defence it's primary canon, have made him his own protector.

3. THERE is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of chusing one, he chuses the

h See Vol. I. pag. 131.
i *l.* 2. *f.* 16.
k *Ff.* 4. 2. 5 & 6.
l 1 Hal. P. C. 50.
m *Ibid.* 51.

least

least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in chusing the less. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public: and therefore excuse the felony, which the killing would otherwise amount to [n].

4. THERE is yet another case of necessity, which has occasioned great speculation among the writers upon general law; *viz.* whether a man in extreme want of food or cloathing may justify stealing either, to relieve his present necessities. And this both Grotius [o] and Puffendorf [p], together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods by a kind of tacit concession of society is revived. And some even of our own lawyers have held the same [q], though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present [r]. And this it's doctrine is agreeable not only to the sentiments of many of the wisest antients, particularly Cicero [s], who holds that "*suum cuique incommodum ferendum est, potius quam* "*de alterius commodis detrahendum;*" but also to the Jewish law, as certified by king Solomon himself [t]: "if a thief "steal to satisfy his soul when he is hungry, he shall restore

[n] 1 Hal. P. C. 53.
[o] *de jure b. & p. l.* 2. *c.* 2.
[p] L. of Nat. and N. l. 2. c. 6.
[q] Britton. c. 10. Mirr. c. 4. §. 16.
[r] 1 Hal. P. C. 54.
[s] *de off. l.* 3. *c.* 5.
[t] Prov. vi. 30.

"seven-

"sevenfold, and shall give all the substance of his house:" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider, that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical: and these have in it's stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate it's rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person;

ſon; which extend as well to the will as to the other qualities of his mind. I mean the caſe of the king: who, by virtue of his royal prerogative, is not under the coercive power of the law[u]; which will not ſuppoſe him capable of committing a folly, much leſs a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the conſequence if the king were to act thus and thus: ſince the law deems ſo highly of his wiſdom and virtue, as not even to preſume it poſſible for him to do any thing inconſiſtent with his ſtation and dignity; and therefore has made no proviſion to remedy ſuch a grievance. But of this ſufficient was ſaid in a former volume[w], to which I muſt refer the reader.

[u] 1 Hal. P.C. 44.

[w] Book I. ch. 7. pag. 244.

CHAPTER THE THIRD.

OF PRINCIPALS AND ACCESSORIES.

IT having been ſhewn in the preceding chapter what perſons are, or are not, upon account of their ſituation and circumſtances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among perſons that are capable of offending; *viz.* as *principal*, and as *acceſſory*.

I. A MAN may be *principal* in an offence in two degrees. A principal, in the firſt degree, is he that is the actor, or abſolute perpetrator of the crime; and, in the ſecond degree, he is who is preſent, aiding, and abetting the fact to be done[a]. Which *preſence* need not always be an actual immediate ſtanding by, within ſight or hearing of the fact; but there may be alſo a conſtructive preſence, as when one commits a robbery or murder, and another keeps watch or guard at ſome convenient diſtance[b]. And this rule hath alſo other exceptions: for, in caſe of murder by poiſoning, a man may be a principal felon, by preparing and laying the poiſon, or perſuading another to drink it[c] who is ignorant of it's poiſonous quality[d], or giving it to him for that purpoſe; and yet not adminiſter it himſelf, nor be preſent when the very deed of poiſoning is committed[e]. And the ſame reaſoning will hold, with regard to other murders committed in the abſence

a 1 Hal. P. C. 615.
b Foſter. 350.
c Kel. 52.
d Foſter. 349.
e 3 Inſt. 138.

of

of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon ensues: in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal: and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist [f].

II. An *accessory* is he who is not the chief actor in the offence, nor present at it's performance, but is someway concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will, first, examine, what offences admit of accessories, and what not: secondly, who may be an accessory *before* the fact: thirdly, who may be an accessory *after* it: and, lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. AND, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime [g]. Besides it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the

[f] 1 Hal. P. C. 617. 2 Hawk. P. C. 315. [g] 3 Inst. 138. 1 Hal. P. C. 613.

very advice and abetment amount to principal treaſon. But this will not hold in the inferior ſpecies of high treaſon, which do not amount to the legal idea of compaſſing the death of the king, queen, or prince. For in thoſe no advice to commit them, unleſs the thing be actually performed, will make a man a principal traitor [h]. In petit treaſon, murder, and felonies with or without benefit of clergy, there may be acceſſories: except only in thoſe offences, which by judgment of law are ſudden and unpremeditated, as manſlaughter and the like; which therefore cannot have any acceſſories *before* the fact [i]. So too in petit larceny, and in all crimes under the degree of felony, there are no acceſſories either *before* or *after* the fact; but all perſons concerned therein, if guilty at all, are principals [k]: the ſame rule holding with regard to the higheſt and loweſt offences; though upon different reaſons. In treaſon all are principals, *propter odium delicti*; in treſpaſs all are principals, becauſe the law, *quae de minimis non curat*, does not deſcend to diſtinguiſh the different ſhades of guilt in petty miſdemeſnors. It is a maxim, that *acceſſorius ſequitur naturam ſui principalis* [l]: and therefore an acceſſory cannot be guilty of a higher crime than his principal; being only puniſhed, as a partaker of his guilt. So that if a ſervant inſtigates a ſtranger to kill his maſter, this being murder in the ſtranger as principal, of courſe the ſervant is acceſſory only to the crime of murder; though, had he been preſent and aſſiſting, he would have been guilty as principal of petty treaſon, and the ſtranger of murder [m].

2. As to the ſecond point, who may be an acceſſory *before* the fact; ſir Matthew Hale [n] defines him to be one, who being abſent at the time of the crime committed, doth yet procure, counſel, or command another to commit a crime. Herein abſence is neceſſary to make him an acceſſory: for if ſuch procurer, or the like, be preſent, he is guilty of the crime as principal. If A then adviſes B to kill another, and

h Foſter. 342.
i 1 Hal. P. C. 615.
k *Ibid.* 613.
l 3 Inſt. 139.
m 2 Hawk. P. C. 315.
n 1 Hal. P. C. 615, 616.

B does

B does it in the abſence of A, now B is principal, and A is acceſſory in the murder. And this holds, even though the party killed be not *in rerum natura* at the time of the advice given. As if A, the reputed father, adviſes B the mother of a baſtard child, unborn, to ſtrangle it when born, and ſhe does ſo; A is acceſſory to this murder [o]. And it is alſo ſettled [p], that whoever procureth a felony to be committed, though it be by the intervention of a third perſon, is an acceſſory before the fact. It is likewiſe a rule, that he who in any wiſe commands or counſels another to commit an unlawful act, is acceſſory to all that enſues upon that unlawful act; but is not acceſſory to any act diſtinct from the other. As if A commands B to beat C, and B beats him ſo that he dies; B is guilty of murder as principal, and A as acceſſory. But if A commands B to burn C's houſe; and he, in ſo doing, commits a robbery; now A, though acceſſory to the burning, is not acceſſory to the robbery, for that is a thing of a diſtinct and unconſequential nature [q]. But if the felony committed be the ſame in ſubſtance with that which is commanded, and only varying in ſome circumſtantial matters; as if, upon a command to poiſon Titius, he is ſtabbed or ſhot, and dies; the commander is ſtill acceſſory to the murder, for the ſubſtance of the thing commanded was the death of Titius, and the manner of it's execution is a mere collateral circumſtance [r].

3. AN acceſſory *after* the fact may be, where a perſon, knowing a felony to have been committed, receives, relieves, comforts, or aſſiſts the felon [s]. Therefore, to make an acceſſory *ex poſt facto*, it is in the firſt place requiſite that he knows of the felony committed [t]. In the next place, he muſt receive, relieve, comfort, or aſſiſt him. And, generally, any aſſiſtance whatever given to a felon, to hinder his being apprehended, tried, or ſuffering puniſhment, makes the aſſiſtor an acceſſory. As furniſhing him with a horſe to eſcape his

o Dyer. 186.
p Foſter. 125.
q 1 Hal. P. C. 617.
r 2 Hawk. P. C. 316.
s 1 Hal. P. C. 618.
t 2 Hawk. P. C. 319.

pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him[t]. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with cloaths or other necessaries, is no offence: for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law[v]. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law, a mere misdemesnor, and made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon*[u]: but now by the statutes 5 Ann. c. 31. and 4 Geo. I. c. 11. all such receivers are made accessories (where the principal felony admits of accessories[w]), and may be transported for fourteen years; and, in the case of receiving linen goods stolen from the bleaching-grounds, are by statute 18 Geo. II. c. 27. declared felons without benefit of clergy. In France such receivers are punished with death: and the Gothic constitutions distinguished also three sorts of thieves, "*unum qui* "*consilium daret, alterum qui contrectaret, tertium qui receptaret et occuleret; pari poenae singulos obnoxios*[x]."

THE felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent; this does not make him accessory to the homicide; for, till death ensues, there is no felony committed[y]. But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony,

t 2 Hawk. P. C. 317, 318.
v 1 Hal. P. C. 620, 621.
u 1 Hal. P. C. 620.
w Foster. 73.
x Stiernhook *de jure Goth. l.* 3. *c.* 5.
y 2 Hawk. P. C. 320.

felony, the receivers become accessories *ex post facto*[z]. But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord[a].

4. THE last point of enquiry is, how accessories are to be treated, considered distinct from principals. And the general rule of the antient law (borrowed from the Gothic constitutions[b]) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable[c]: as, by the laws of Athens, delinquents and their abettors were to receive the same punishment[d]. Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons. 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because, though by the antient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them: accessories *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing[e] and stealing of linen from bleaching-grounds[f]; which is denied to the principals, and accessories *before* the fact, in many cases; as, among others, in petit treason, murder, robbery, and wilful burning[g]. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would

z 3 Inst. 108. 2 Hawk. P. C. 320.
a 1 Hal. P. C. 621.
b See Stiernhook. *ibid.*
c 3 Inst. 188.
d Pott. Antiq. b. 1. c. 26.
e Stat. 31 Eliz. c. 12.
f Stat. 18 Geo. II. c. 27.
g 1 Hal. P. C. 615.

be greater than that of his accomplices, by reason of the difference of his punishment[h]. 3. Because formerly no man could be tried as accessory, till after the principal was convicted, or at least he must have been tried at the same time with him: though that law is now much altered, as will be shewn more fully in it's proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal: for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also[i]. But it is clearly held, that one acquitted as principal may be indicted as an accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in it's commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessories as offend *before* the fact is committed.

h Beccar. c. 37.

i 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foster. 361.

CHAPTER THE FOURTH.

OF OFFENCES AGAINST GOD AND RELIGION.

IN the present chapter we are to enter upon the detail of the several species of crimes and misdemesnors, with the punishment annexed to each by the laws of England. It was observed in the beginning of this book[a], that crimes and misdemesnors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in it's social aggregate capacity. And in the very entrance of these commentaries[b] it was shewn, that human laws can have no concerns with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society[c]: and, of consequence, private vices, or breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowlege and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any

a See pag. 5.

b See Vol. I. pag. 123, 124.

c Beccar. ch. 8.

shape

ſhape is derogatory from ſound morality, is not however taken notice of by our law, unleſs it carries with it ſome public inconvenience, as ſpreading falſe news; or ſome ſocial injury, as ſlander and malicious proſecution, for which a private recompence is given. And yet drunkenneſs and malevolent lying are in *foro conſcientiae* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are ſubject to the vengeance of eternal juſtice; and public vices are beſides liable to the temporal puniſhments of human tribunals.

ON the other hand, there are ſome miſdemeſnors, which are puniſhed by the municipal law, that have in themſelves nothing criminal, but are made unlawful by the poſitive conſtitutions of the ſtate for public convenience. Such as poaching, exportation of wool, and the like. Theſe are naturally no offences at all; but their whole criminality conſiſts in their diſobedience to the ſupreme power, which has an undoubted right, for the well-being and peace of the community, to make ſome things unlawful, which are in themſelves indifferent. Upon the whole therefore, though part of the offences to be enumerated in the following ſheets are offences againſt the revealed law of God, others againſt the law of nature, and ſome are offences againſt neither; yet in a treatiſe of municipal law we muſt conſider them all as deriving their particular guilt, here puniſhable, from the law of man.

HAVING premiſed this caution, I ſhall next proceed to diſtribute the ſeveral offences, which are either directly or by conſequence injurious to civil ſociety, and therefore puniſhable by the laws of England, under the following general heads: firſt, thoſe which are more immediately injurious to God and his holy religion; ſecondly, ſuch as violate and tranſgreſs the law of nations; thirdly, ſuch as more eſpecially affect the ſovereign executive power of the ſtate, or the king and his government; fourthly, ſuch as more directly

infringe the rights of the public or commonwealth; and, laſtly, ſuch as derogate from thoſe rights and duties, which are owing to particular individuals, and in the preſervation and vindication of which the community is deeply intereſted.

FIRST then, of ſuch crimes and miſdemeſnors, as more immediately offend Almighty God, by openly tranſgreſſing the precepts of religion either natural or revealed; and mediately by their bad example and conſequence, the law of ſociety alſo; which conſtitutes that guilt in the action, which human tribunals are to cenſure.

I. OF this ſpecies the firſt is that of *apoſtacy*, or a total renunciation of chriſtianity, by embracing either a falſe religion, or no religion at all. This offence can only take place in ſuch as have once profeſſed the true religion. The perverſion of a chriſtian to judaiſm, paganiſm, or other falſe religion, was puniſhed by the emperors Conſtantius and Julian with confiſcation of goods [d]; to which the emperors Theodoſius and Valentinian added capital puniſhment, in caſe the apoſtate endeavoured to pervert others to the ſame iniquity [e]. A puniſhment too ſevere for any temporal laws to inflict upon any ſpiritual offence: and yet the zeal of our anceſtors imported it into this country; for we find by Bracton [f], that in his time apoſtates were to be burnt to death. Doubtleſs the preſervation of chriſtianity, as a national religion, is, abſtracted from it's own intrinſic truth, of the utmoſt conſequence to the civil ſtate: which a ſingle inſtance will ſufficiently demonſtrate. The belief of a future ſtate of rewards and puniſhments, the entertaining juſt ideas of the moral attributes of the ſupreme being, and a firm perſuaſion that he ſuperintends and will finally compenſate every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our ſaviour Chriſt) theſe are the grand foundation of all judicial oaths; which call God to witneſs the truth of thoſe facts, which perhaps may be only known to him and the party atteſting: all moral evidence

[d] Cod. 1. 7. 1.
[e] *Ibid.* 6.
[f] *l.* 3. *c.* 9.

therefore,

therefore, all confidence in human veracity, must be weaked by apostacy, and overthrown by total infidelity[g]. Wherefore all affronts to christianity, or endeavours to depreciate it's efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves; and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostacy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animae*. But about the close of the last century, the civil liberties to which we were then restored being used as a cloke of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those miscreants[h] to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 W. III. c. 32. that if any person educated in, or having made profession of, the christian religion, shall by writing, printing, teaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchasor of lands, and shall suffer three years imprisonment without bail. To give room however for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A SECOND offence is that of *heresy*, which consists not in a total denial of christianity, but of some of it's essential

[g] *Utiles esse opiniones has, quis negat, cum intelligat, quam multa firmentur jurejurando; quantae salutis sint foederum religiones; quam multos divini supplicii metus a scelere revocarit; quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum judicibus tum testibus?* Cic. de LL. ii. 7.

[h] *Mescreyantz* in our antient law books is the name of unbelievers.

doctrines,

doctrines, publicly and obstinately avowed; being defined by sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa*[i]. And here it must also be acknowleged that particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode[k], extends to the smallest deviations from the doctrines of holy church "*haereticus est qui dubitat de fide catholica, et qui negligit servare ea, quae Romana ecclesia statuit, seu servare decreverat.*" Or, as the statute 2 Hen. IV. c. 15. expresses it in English, "teachers of erroneous opinions, contrary to the faith and "blessed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigoted princes, to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderatur*[l]: well knowing at the same time that they were delivering the un-

i 1 Hal. P. C. 384.
k *cap. de haereticis.*
l *Decretal. l. 5. t. 40. c. 27.*

happy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichaeans by the emperors Theodosius and Justinian [m]: hence also the constitution of the emperor Frederic mentioned by Lyndewode [n], adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution [o], ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seise and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou [p].

CHRISTIANITY being thus deformed by the daemon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our antient precedents [q] a writ *de haeretico comburendo*, which is thought by some to be as antient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de haeretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council [r].

m *Cod. l.* 1. *tit.* 5.
n *c. de haereticis.*
o *Cod.* 1. 5. 4.
p Baldus *in Cod.* 1. 5. 4.
q F. N. B. 269.
r 1 Hal. P. C. 395.

BUT in the reign of Henry the fourth, when the eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy[s]) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament[t], which sharpened the edge of persecution to it's utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V. c. 7. lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

AFTERWARDS, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for though what heresy is, was not then precisely defined, yet we are told in some points what it is *not*: the statute 25 Hen. VIII. c. 14. declaring, that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. VIII. c. 14. the bloody law of the six articles was made, which established the six most contested points of popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by "the most godly study, pain, and travail of his majesty: for

[s] So called not from *lolium*, or tares, (an etymology, which was afterwards devised in order to justify the burning of them; Matt. xiii. 30.) but from one Walter Lolhard, a German reformer, A. D. 1315. Mod. Un. Hist. xxvi. 13. Spelm. *Gloss.* 371.

[t] 2 Hen. IV. c. 15.

"which

"which his moſt humble and obedient ſubjects, the lords "*ſpiritual* and temporal and the commons, in parliament "aſſembled, did not only render and give unto his highneſs "their moſt high and hearty thanks," but did alſo enact and declare all oppugners of the firſt to be heretics, and to be burnt with fire; and of the five laſt to be felons, and to ſuffer death. The ſame ſtatute eſtabliſhed a new and mixed juriſdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on deſtroying the ſupremacy of the biſhops of Rome, and eſtabliſhing all other their corruptions of the chriſtian religion.

I SHALL not perplex this detail with the various repeals and revivals of theſe ſanguinary laws in the two ſucceeding reigns; but ſhall proceed directly to the reign of queen Elizabeth; when the reformation was finally eſtabliſhed with temper and decency, unſullied with party rancour, or perſonal caprice and reſentment. By ſtatute 1 Eliz. c. 1. all former ſtatutes relating to hereſy are repealed, which leaves the juriſdiction of hereſy as it ſtood at common law; *viz.* as to the infliction of common cenſures, in the eccleſiaſtical courts; and in caſe of burning the heretic, in the provincial ſynod only[v]. Sir Matthew Hale is indeed of a different opinion, and holds that ſuch power reſided in the dioceſan alſo, though he agrees, that in either caſe the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwiſe merely at the king's diſcretion[u]. But the principal point now gained was, that by this ſtatute a boundary is for the firſt time ſet to what ſhall be accounted hereſy; nothing for the future being to be ſo determined, but only ſuch tenets, which have been heretofore ſo declared, 1. By the words of the canonical ſcriptures; 2. By the firſt four general councils, or ſuch others as have only uſed the words of the holy ſcriptures; or, 3. Which ſhall hereafter be ſo declared by the parliament, with the aſſent of the clergy in convocation. Thus was hereſy reduced to a greater certainty than before; though it might not have been the worſe to have defined it in terms ſtill more preciſe and particular: as a man continued ſtill liable

v 5 Rep. 23. 12 Rep. 56. 92. u 1 Hal. P. C. 405.

to

to be burnt, for what perhaps he did not underſtand to be hereſy, till the eccleſiaſtical judge ſo interpreted the words of the canonical ſcriptures.

FOR the writ *de haeretico comburendo* remained ſtill in force; and we have inſtances of it's being put in execution upon two anabaptiſts in the ſeventeenth of Elizabeth, and two Arians in the ninth of James the firſt. But it was totally aboliſhed, and hereſy again ſubjected only to eccleſiaſtical correction *pro ſalute animae*, by virtue of the ſtatute 29 Car. II. c. 9. For, in one and the ſame reign, our lands were delivered from the ſlavery of military tenures; our bodies from arbitrary impriſonment by the *habeas corpus* act; and our minds from the tyranny of ſuperſtitious bigotry, by demoliſhing this laſt badge of perſecution in the Engliſh law.

IN what I have now ſaid I would not be underſtood to derogate from the juſt rights of the national church, or to favour a looſe latitude of propagating any crude undigeſted ſentiments in religious matters. Of propagating, I ſay; for the bare entertaining them, without an endeavour to diffuſe them, ſeems hardly cognizable by any human authority. I only mean to illuſtrate the excellence of our preſent eſtabliſhment, by looking back to former times. Every thing is now as it ſhould be, with reſpect to the ſpiritual cognizance, and ſpiritual puniſhment, of hereſy: unleſs perhaps that the crime ought to be more ſtrictly defined, and no proſecution permitted, even in the eccleſiaſtical courts, till the tenets in queſtion are by proper authority previouſly declared to be heretical. Under theſe reſtrictions, it ſeems neceſſary for the ſupport of the national religion, that the officers of the church ſhould have power to cenſure heretics; yet not to haraſs them with temporal penalties, much leſs to exterminate or deſtroy them. The legiſlature hath indeed thought it proper, that the civil magiſtrate ſhould again interpoſe, with regard to one ſpecies of hereſy, very prevalent in modern times; for by ſtatute 9 & 10 W. III. c. 32. if any perſon educated in the chriſtian religion, or profeſſing the ſame, ſhall by writing, printing, teaching, or adviſed ſpeaking, deny any one of the perſons in the holy trinity to be God, or maintain that there

there are more Gods than one, he ſhall undergo the ſame penalties and incapacities, which were juſt now mentioned to be inflicted on apoſtacy by the ſame ſtatute. And thus much for the crime of hereſy.

III. ANOTHER ſpecies of offences againſt religion are thoſe which affect the *eſtabliſhed church.* And theſe are either poſitive, or negative: poſitive, by reviling it's ordinances; or negative, by non-conformity to it's worſhip. Of both of theſe in their order.

1. AND, firſt, of the offence of *reviling the ordinances* of the church. This is a crime of a much groſſer nature than the other of mere non-conformity; ſince it carries with it the utmoſt indecency, arrogance, and ingratitude: indecency, by ſetting up private judgment in virulent and factious oppoſition to public authority: arrogance, by treating with contempt and rudeneſs what has at leaſt a better chance to be right, than the ſingular notions of any particular man; and ingratitude, by denying that indulgence and undiſturbed liberty of conſcience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by ſtatutes 1 Edw. VI. c. 1. and 1 Eliz. c. 1. that whoever reviles the ſacrament of the lord's ſupper ſhall be puniſhed by fine and impriſonment: and by the ſtatute 1 Eliz. c. 2. if any miniſter ſhall ſpeak any thing in derogation of the book of common prayer, he ſhall, if not beneficed, be impriſoned one year for the firſt offence, and for life for the ſecond: and, if he be beneficed, he ſhall for the firſt offence be impriſoned ſix months, and forfeit a year's value of his benefice: for the ſecond offence he ſhall be deprived, and ſuffer one year's impriſonment; and, for the third, ſhall in like manner be deprived, and ſuffer impriſonment for life. And if *any perſon* whatſoever ſhall in plays, ſongs, or other open words, ſpeak any thing in derogation, depraving, or deſpiſing of the ſaid book, or ſhall forcibly prevent the reading of it, or cauſe any other ſervice to be uſed in it's ſtead, he ſhall forfeit for the firſt offence an hundred marks; for the ſecond, four hundred; and for the third, ſhall forfeit all his goods and chattels, and ſuffer impriſonment for life. Theſe

penalties were framed in the infancy of our present establishment: when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy: and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time (of the milder penalties at least) be thought too severe and intolerant; so far as they are levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and *obstructing* it's ordinances, for not submitting it's public judgment to the private opinion of others. For, though it is clear, that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship; yet contumely and contempt are what no establishment can tolerate [v]. A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and absurd: but the latter is at present the less excusable, because from political reasons, sufficiently hinted at in a former volume [w], it would now be extremely unadviseable to make any alterations in the service of the church; unless by it's own consent, or unless it can be shewn that some manifest impiety or shocking absurdity will follow from continuing the present forms.

2. NON-CONFORMITY to the worship of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a matter of private conscience, to the scruples of which our present laws have shewn a very just and christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger

v By an ordinance 23 Aug. 1645, which continued till the restoration, to preach, write, or print, any thing in derogation or depraving of the *directory*, for the then established presbyterian worship, subjected the offender upon indictment to a discretionary fine, not exceeding fifty pounds. (Scobell. 98.)

w Vol. I. pag. 98.

the national church: there is always a difference to be made between toleration and eſtabliſhment.

NON-CONFORMISTS are of two ſorts: firſt, ſuch as abſent themſelves from divine worſhip in the eſtabliſhed church, through total irreligion, and attend the ſervice of no other perſuaſion. Theſe by the ſtatutes of 1 Eliz. c. 2. 23 Eliz. c. 1. and 3 Jac. I. c. 4. forfeit one ſhilling to the poor every lord's day they ſo abſent themſelves, and 20*l* to the king if they continue ſuch default for a month together. And if they keep any inmate, thus irreligiouſly diſpoſed, in their houſes, they forfeit 10*l per* month.

THE ſecond ſpecies of non-conformiſts, are thoſe who offend through a miſtaken or perverſe zeal. Such were eſteemed by our laws, enacted ſince the time of the reformation, to be papiſts and proteſtant diſſenters: both of which were ſuppoſed to be equally ſchiſmatics in not communicating with the national church; with this difference, that the papiſts divided from it upon material, though erroneous, reaſons; but many of the diſſenters upon matters of indifference, or, in other words, upon no reaſon at all. Yet certainly our anceſtors were miſtaken in their plans of compulſion and intolerance. The ſin of ſchiſm, as ſuch, is by no means the object of temporal coercion and puniſhment. If through weakneſs of intellect, through miſdirected piety, through perverſeneſs and acerbity of temper, or (which is often the caſe) through a proſpect of ſecular advantage in herding with a party, men quarrel with the eccleſiaſtical eſtabliſhment, the civil magiſtrate has nothing to do with it; unleſs their tenets and practice are ſuch as threaten ruin or diſturbance to the ſtate. He is bound indeed to protect the eſtabliſhed church: and, if this can be better effected, by admitting none but it's genuine members to offices of truſt and emolument, he is certainly at liberty ſo to do; the diſpoſal of offices being matter of favour and diſcretion. But, this point being once ſecured, all perſecution for diverſity of opinions, however ridiculous or abſurd they may be, is contrary to every principle of ſound policy and civil freedom. The names and ſubordination of the clergy, the poſture of devotion, the materials and colour

of the miniſter's garment, the joining in a known or an unknown form of prayer, and other matters of the ſame kind, muſt be left to the option of every man's private judgment.

WITH regard therefore to *proteſtant diſſenters*, although the experience of their turbulent diſpoſition in former times occaſioned ſeveral diſabilities and reſtrictions (which I ſhall not undertake to juſtify) to be laid upon them by abundance of ſtatutes [x], yet at length the legiſlature, with a ſpirit of true magnanimity, extended that indulgence to theſe ſectaries, which they themſelves, when in power, had held to be countenancing ſchiſm, and denied to the church of England [y]. The penalties are conditionally ſuſpended by the ſtatute 1 W. & M. ſt. 1. c. 18. "for exempting their majeſties proteſtant "ſubjects, diſſenting from the church of England, from the "penalties of certain laws," commonly called the toleration act; which is confirmed by ſtatute 10 Ann. c. 2. and declares that neither the laws above-mentioned, nor the ſtatutes 1 Eliz. c. 2. §. 14. 3 Jac. I. c. 4 & 5. nor any other penal laws made againſt popiſh recuſants (except the teſt acts) ſhall extend to any diſſenters, other than papiſts and ſuch as deny the trinity: provided, 1. that they take the oaths of allegiance and ſupremacy (or make a ſimilar affirmation, being quakers [z]) and ſubſcribe the declaration againſt popery; 2. that they repair to ſome congregation certified to and regiſtered in the court of the biſhop or archdeacon, or at the county ſeſſions; 3. that the doors of ſuch meeting-houſe ſhall be unlocked, unbarred, and unbolted; in default of which the perſons meeting there are ſtill liable to all the penalties of the former acts. Diſſenting teachers, in order to be exempted from the penalties of the ſtatutes 13 & 14 Car. II. c. 4. 15 Car. II. c. 6. 17 Car. II. c. 2. and 22 Car. II. c. 1. are alſo to ſubſcribe the articles of religion mentioned in the ſtatute 13 Eliz. c. 12. (which only concern the confeſſion of the true chriſtian faith, and the doctrine of the ſacraments) with an expreſs exception of thoſe relating to the government

x 23 Eliz. c. 1. 29 Eliz. c. 6. 35 Eliz. c. 1. 22 Car. II. c. 1.

y The ordinance of 1645 (before-cited) inflicted impriſonment for a year on the third offence, and pecuniary penalties on the former two, in caſe of uſing the book of common-prayer not only in a place of public worſhip, but alſo in any private family.

z See ſtat. 8 Geo. I. c. 6.

and powers of the church, and to infant baptiſm; or if they ſcruple ſubſcribing the ſame, ſhall make and ſubſcribe the declaration preſcribed by ſtatute 19 Geo. III. c. 44. profeſſing themſelves to be chriſtians and proteſtants, and that they believe the ſcriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means univerſally abrogated, it is ſuſpended and ceaſes to exiſt with regard to theſe proteſtant diſſenters, during their compliance with the conditions impoſed by theſe acts: and, under theſe conditions, all perſons, who will approve themſelves no papiſts or oppugners of the trinity, are left at full liberty to act as their conſciences ſhall direct them, in the matter of religious worſhip. And if any perſon ſhall wilfully, maliciouſly, or contemptuouſly diſturb any congregation, aſſembled in any church or permitted meeting-houſe, or ſhall miſuſe any preacher or teacher there, he ſhall (by virtue of the ſame ſtatute 1 W. & M.) be bound over to the ſeſſions of the peace, and forfeit twenty pounds. But by ſtatute 5 Geo. I. c. 4. no mayor or principal magiſtrate, muſt appear at any diſſenting meeting with the enſigns of his office [a], on pain of diſability to hold that or any other office: the legiſlature judging it a matter of propriety, that a mode of worſhip, ſet up in oppoſition to the national, when allowed to be exerciſed in peace, ſhould be exerciſed alſo with decency, gratitude, and humility. Diſſenters alſo, who ſubſcribe the declaration of the act 19 Geo. III. are exempted (unleſs in the caſe of endowed ſchools and colleges) from the penalties of the ſtatutes 13 & 14 Car. II. c. 4. & 17 Car. II. c. 2. which prohibit (upon pain of fine and impriſonment) all perſons from teaching ſchool unleſs they be licenſed by the ordinary, and ſubſcribe a declaration of conformity to the liturgy of the church, and reverently frequent divine ſervice *eſtabliſhed* by the laws of this kingdom.

As to *papiſts*, what has been ſaid of the proteſtant diſſenters would hold equally ſtrong for a general toleration of them;

[a] Sir Humphry Edwin, a lord mayor of London, had the imprudence ſoon after the toleration act to go to a preſbyterian meeting-houſe in his formalities; which is alluded to by dean Swift, in his *tale of a tub*, under the allegory of *Jack* getting on a great horſe, and eating cuſtard.

provided

provided their ſeparation was founded only upon difference of opinion in religion, and their principles did not alſo extend to a ſubverſion of the civil government. If once they could be brought to renounce the ſupremacy of the pope, they might quietly enjoy their ſeven ſacraments, their purgatory, and auricular confeſſion; their worſhip of reliques and images; nay even their tranſubſtantiation. But while they acknowlege a foreign power, ſuperior to the ſovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good ſubjects.

LET us therefore now take a view of the laws in force againſt the papiſts; who may be divided into three claſſes, perſons profeſſing popery, popiſh recuſants convict, and popiſh prieſts. 1. Perſons profeſſing the popiſh religion, beſides the former penalties for not frequenting their pariſh church, are diſabled from taking their lands either by deſcent or purchaſe, after eighteen years of age, until they renounce their errors; they muſt at the age of twenty-one regiſter their eſtates before acquired, and all future conveyances and wills relating to them; they are incapable of preſenting to any advowſon, or granting to any other perſon any avoidance of the ſame; they may not keep or teach any ſchool under pain of perpetual impriſonment; and, if they willingly ſay or hear maſs, they forfeit the one two hundred, the other one hundred marks, and each ſhall ſuffer a year's impriſonment. Thus much for perſons, who, from the misfortune of family prejudices or otherwiſe, have conceived an unhappy attachment to the Romiſh church from their infancy, and publicly profeſs its errors. But if any evil induſtry is uſed to rivet theſe errors upon them, if any perſon ſends another abroad to be educated in the popiſh religion, or to reſide in any religious houſe abroad for that purpoſe, or contributes to their maintenance when there; both the ſender, the ſent, and the contributor, are diſabled to ſue in law or equity, to be executor or adminiſtrator to any perſon, to take any legacy or deed of gift, and to bear any office in the realm, and ſhall forfeit all their goods and chattels, and likewiſe all their real eſtate for life. And where theſe errors are alſo aggravated by apoſtacy, or perverſion, where a perſon is reconciled to the ſee of Rome, or procures others to be

be reconciled, the offence amounts to high treaſon. 2. Popiſh recuſants, convicted in a court of law of not attending the ſervice of the church of England, are ſubject to the following diſabilities, penalties, and forfeitures, over and above thoſe before-mentioned. They are conſidered as perſons excommunicated; they can hold no office or employment; they muſt not keep arms in their houſes, but the ſame may be ſeized by the juſtices of the peace; they may not come within ten miles of London, on pain of 100*l*; they can bring no action at law, or ſuit in equity; they are not permitted to travel above five miles from home, unleſs by licence, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l*. No marriage or burial of ſuch recuſant, or baptiſm of his child, ſhall be had otherwiſe than by the miniſters of the church of England, under other ſevere penalties. A married woman, when recuſant, ſhall forfeit two thirds of her dower or jointure, may not be executrix or adminiſtratrix to her huſband, nor have any part of his goods; and during the coverture may be kept in priſon, unleſs her huſband redeems her at the rate of 10*l*. a month, or the third part of all his lands. And laſtly, as a feme-covert recuſant may be impriſoned, ſo all others muſt, within three months after conviction, either ſubmit and renounce their errors, or, if required ſo to do by four juſtices, muſt abjure and renounce the realm; and if they do not depart, or if they return without the king's licence, they ſhall be guilty of felony, and ſuffer death as felons without benefit of clergy. There is alſo an inferior ſpecies of recuſancy, (refuſing to make the declaration againſt popery enjoined by ſtatute 30 Car. II. ſt. 2. when tendered by the proper magiſtrate) which, if the party reſides within ten miles of London, makes him an abſolute recuſant convict; or, if at a greater diſtance, ſuſpends him from having any ſeat in parliament, keeping arms in his houſe, or any horſe above the value of five pounds. This is the ſtate, by the laws now in being [b], of a lay papiſt. But, 3. The remaining ſpecies or de-

[b] Stat. 23 Eliz. c. 1. 27 Eliz. c. 2. 29 Eliz. c. 6. 35 Eliz. c. 2. 1 Jac. I. c. 4. 3 Jac. I. c. 4 & 5. 7 Jac. I. c. 6. 3 Car. I. c. 3. 25 Car. II. c. 2. 30 Car. II. ſt. 2. 1 W. & M. c. 9. 15, & 26. 11 & 12 W. III. c. 4. 12 Ann. ſt. 2. c. 14. 1 Geo. I. ſt. 2. c. 55. 3 Geo. I. c. 18. 11 Geo. II. c. 17.

gree, *viz.* popish priests, are in a still more dangerous condition. For by statute 11 & 12 W. III. c. 4. popish priests or bishops, celebrating mass or exercising any part of their functions in England, except in the houses of embassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2. any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, (unless driven by stress of weather and tarrying only a reasonable time [c]) or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy.

THIS is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes [d], that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, (what foreigners who only judge from our statute book are not fully apprized of) that these laws are seldom exerted to their utmost rigor: and indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic into James I, which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I, the prospect of a popish successor in that of Charles II, the assassination-plot in the reign of king William, and the avowed claim of a popish pretender to the crown in that and subsequent reigns, will account for the

[c] Raym. 377. Latch. 1.

[d] Sp. L. b. 19. c. 27.

extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England but in every kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts; at least till the *civil* principles of the roman catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot, to drag down the vengeance of these occasional laws upon inoffensive, though mistaken, subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

THIS hath partly been done by statute 18 Geo. III. c. 60. with regard to such papists as duly take the oath therein prescribed, of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only, the statute of 11 & 12 W. III. is repealed, so far as it disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth.

IN order the better to secure the established church against perils from non-conformists of all denominations, infidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the *corporation* and *test* acts: by the former of which [e] no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the lord's supper according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office: or, in default of either of these requisites, such election shall be void. The other, called the test act [f], directs all officers civil and military to take the oaths and make the declaration against transubstantiation, in any of the king's

[e] Stat. 13 Car. II. st. 2. c. 1. [f] Stat. 25 Car. II. c. 2. explained by 9 Geo. II. c. 26.

courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time to receive the sacrament of the lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-wardens, and also to prove the same by two credible witnesses; upon forfeiture of 500 *l*, and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I. c. 2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favour of the Jews, was the next session of parliament restored again with some precipitation.

THUS much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animae*; while the temporal courts resent the public affront to religion and morality on which all government must depend for support, and correct more for the sake of example than private amendment.

IV. THE fourth species of offences therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty, by denying his being or providence; or by contumelious reproaches of our saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment[g]: for christianity is part of the laws of England[h].

V. SOMEWHAT allied to this, though in an inferior degree, is the offence of profane and common *swearing* and

g 1 Hawk. P. C. 7.

h 1 Vent. 293. 2 Strange. 834.

cursing,

cursing. By the last statute against which, 19 Geo. II. c. 21. which repeals all former ones, every labourer, sailor, or soldier profanely cursing or swearing shall forfeit 1 *s*, every other person under the degree of a gentleman 2 *s*, and every gentleman or person of superior rank 5 *s*, to the poor of the parish; and, on a second conviction, double; and, for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness: and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he forfeits 5 *l*, and the constable 40 *s*. And the act is to be read in all parish churches, and public chapels, the sunday after every quarter day, on pain of 5 *l* to be levied by warrant from any justice. Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I. c. 21. that if in any stage play, interlude, or shew, the name of the holy trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10 *l*; one moiety to the king, and the other to the informer.

VI. A SIXTH species of offences against God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft*, *conjuration*, *inchantment*, or *sorcery*. To deny the possibility, nay, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the old and new testament: and the thing itself is a truth to which every nation in the world hath in it's turn borne testimony, either by examples seemingly well attested, or by prohibitory laws; which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them [i]; imitating in the former the express law of God [k], "thou shalt not suffer a witch to live." And our own laws, both before and since the conquest, have been equally penal; ranking this crime in the same class with he-

[i] *Cod. l.* 9. *t.* 18.

[k] Exod. xxii. 18.

resy,

resy, and condemning both to the flames[l]. The president Montesquieu[m] ranks them also both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own[n], that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it.

OUR forefathers were stronger believers, when they enacted by statute 33 Hen. VIII. c. 8. all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1 Jac. I. c. 12. that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or inchantment; or killing or otherwise hurting any person by such infernal arts; should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force till lately, to the terror of all ancient females in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbours, and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of Louis XIV. in France, who thought proper by an edict to re-

l 3 Inst. 44.
m Sp. L. b. 12. c. 5.
n Mr. Addison, Spect. Nº. 117.

strain

ſtrain the tribunals of juſtice from receiving informations of witchcraft [o]. And accordingly it is with us enacted by ſtatute 9 Geo. II. c. 5. that no proſecution ſhall for the future be carried on againſt any perſon for conjuration, witchcraft, ſorcery, or inchantment. But the miſdemeſnor of perſons pretending to uſe witchcraft, tell fortunes, or diſcover ſtolen goods by ſkill in the occult ſciences, is ſtill deſervedly puniſhed with a year's impriſonment, and ſtanding four times in the pillory.

VII. A SEVENTH ſpecies of offenders in this claſs are all *religious impoſtors:* ſuch as falſly pretend an extraordinary commiſſion from heaven; or terrify and abuſe the people with falſe denunciations of judgments. Theſe, as tending to ſubvert all religion, by bringing it into ridicule and contempt, are puniſhable by the temporal courts with fine, impriſonment, and infamous corporal puniſhment [p].

VIII. SIMONY, or the corrupt preſentation of any one to an eccleſiaſtical benefice for gift or reward, is alſo to be conſidered as an offence againſt religion; as well by reaſon of the ſacredneſs of the charge which is thus profanely bought and ſold, as becauſe it is always attended with perjury in the perſon preſented [q]. The ſtatute 31 Eliz. c. 6. (which, ſo far as it relates to the forfeiture of the right of preſentation, was conſidered in a former book [r]) enacts, that if any patron, for money or any other corrupt conſideration or promiſe, directly or indirectly given, ſhall preſent, admit, inſtitute, induct, inſtall, or collate any perſon to an eccleſiaſtical benefice or dignity, both the giver and taker ſhall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will ſue for the ſame. If perſons alſo corruptly reſign or exchange their benefices, both the giver and taker ſhall in like manner forfeit double the value of the money or other corrupt conſideration. And perſons who ſhall corruptly ordain or licence any miniſter, or procure him to be ordained or licenced (which is the true idea of ſimony) ſhall incur a like forfeiture of forty pounds; and the miniſter

[o] Voltaire *Siecl. Louis xiv.* ch. 29. Mod. Un. Hiſt. xxv. 215. Yet Vouglans (*de droit criminel,* 353. 459.) ſtill reckons up ſorcery and witchcraft among the crimes puniſhable in France.

[p] 1 Hawk. P. C. 7.

[q] 3 Inſt. 156.

[r] See Vol. II. p. 279.

himſelf

himſelf of ten pounds, beſides an incapacity to hold any eccleſiaſtical preferment for ſeven years afterwards. Corrupt elections and reſignations in colleges, hoſpitals, and other eleemoſynary corporations, are alſo puniſhed by the ſame ſtatute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

IX. PROFANATION of the lord's day, vulgarly (but improperly) called *ſabbath-breaking*, is a ninth offence againſt God and religion, puniſhed by the municipal law of England. For, beſides the notorious indecency and ſcandal, of permitting any ſecular buſineſs to be publicly tranſacted on that day, in a country profeſſing chriſtianity, and the corruption of morals which uſually follows it's profanation, the keeping one day in ſeven holy, as a time of relaxation and refreſhment as well as for public worſhip, is of admirable ſervice to a ſtate, conſidered merely as a civil inſtitution. It humanizes by the help of converſation and ſociety the manners of the lower claſſes; which would otherwiſe degenerate into a ſordid ferocity and ſavage ſelfiſhneſs of ſpirit: it enables the induſtrious workman to purſue his occupation in the enſuing week with health and chearfulneſs: it imprints on the minds of the people that ſenſe of their duty to God, ſo neceſſary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any ſtated times of recalling them to the worſhip of their maker. And therefore the laws of king Athelſtan forbad all merchandizing on the lord's day, under very ſevere penalties. And by the ſtatute 27 Hen. VI. c. 5. no fair or market ſhall be held on the principal feſtivals, good friday, or any ſunday, (except the four ſundays in harveſt) on pain of forfeiting the goods expoſed to ſale. And, ſince by the ſtatute 1 Car. I. c. 1. no perſon ſhall aſſemble, out of their own pariſhes, for any ſport whatſoever upon this day; nor, in their pariſhes, ſhall uſe any bull or bear baiting, interludes, plays, or other *unlawful* exerciſes, or paſtimes; on pain that every offender ſhall pay 3*s* 4*d* to the poor. This ſtatute does not prohibit, but rather impliedly allows, any innocent recreation or amuſement, within their

ˢ c. 24.

respective parishes, even on the lord's day, after divine service is over. But by statute 29 Car. II. c. 7. no person is allowed to *work* on the lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5*s*. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings (*b*).

X. DRUNKENNESS is also punished by statute 4. Jac. I. c. 5. with the forfeitnre of 5*s*; or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholesome statutes, by way of prevention, chiefly passed in the same reign of king James I, which regulate the licencing of ale-houses, and punish persons found tippling therein; or the masters of such houses permitting them.

XI. THE last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*: either by frequenting houses of ill fame, which is an indict-

(*b*) [By statute 21 Geo. 3. c. 49. it is enacted, that any house, room, or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, within the cities of London or Westminster, or in the neighbourhood thereof, upon any part of the lord's day called sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place, shall forfeit the sum of 200 *l*. for every day that such house, room, or place shall be opened or used as aforesaid on the lord's day, to such person as will sue for the same; and be otherwise punishable as the law directs in cases of disorderly houses: and the person managing or conducting such entertainment or amusement on the lord's day, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting for public debate on the lord's day, shall likewise for every such offence forfeit the sum of 100 *l*. to such person as will sue for the same; and every door-keeper, servant, or other person who shall collect or receive money or tickets from persons assembling at such house, room, or place on the lord's day, or who shall deliver out tickets for admitting persons to such house, room, or place on the lord's day, shall also forfeit the sum of 50 *l*. to such person as will sue for the same: and that any person advertising or causing to be advertised any public entertainment or amusement, or any public meeting for debating on any subject whatsoever, on the lord's day, to which persons are to be admitted by the payment of money, or by tickets sold for money; and any person printing or publishing any such advertisement, shall respectively forfeit the sum of 50 *l*. for every such offence, to any person who will sue for the same.]

able offence[t]; or by ſome groſsly ſcandalous and public indecency, for which the puniſhment is by fine and impriſonment[u]. In the year 1650, when the ruling powers found it for their intereſt to put on the ſemblance of a very extraordinary ſtrictneſs and purity of morals, not only inceſt and wilful adultery were made capital crimes; but alſo the repeated act of keeping a brothel, or committing fornication, were (upon a ſecond conviction) made felony without benefit of clergy[w]. But at the reſtoration, when men, from an abhorrence of the hypocriſy of the late times, fell into a contrary extreme of licentiouſneſs, it was not thought proper to renew a law of ſuch unfaſhionable rigour. And theſe offences have been ever ſince left to the feeble coercion of the ſpiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itſelf, with a great degree of tenderneſs and lenity; owing perhaps to the conſtrained celibacy of it's firſt compilers. The temporal courts therefore take no cognizance of the crime of adultery, otherwiſe than as a private injury[x].

BUT, before we quit this ſubject, we muſt take notice of the temporal puniſhment for having *baſtard children*, conſidered in a criminal light; for with regard to the maintenance of ſuch illegitimate offspring, which is a civil concern, we have formerly ſpoken at large[y]. By the ſtatute 18 Eliz. c. 3. two juſtices may take order for the puniſhment of the mother and reputed father; but what that puniſhment ſhall be is not therein aſcertained; though the contemporary expoſition was, that a corporal puniſhment was intended[z]. By ſtatute 7 Jac. I. c. 4. a ſpecific puniſhment (*viz.* commitment to the houſe of correction) is inflicted on the woman only. But in both caſes, it ſeems that the penalty can only be inflicted, if the baſtard becomes chargeable to the pariſh; for otherwiſe the very maintenance of the child is conſidered as a degree of puniſhment. By the laſt mentioned ſtatute the juſtices may commit the mother to the houſe of correction, there to be puniſhed and ſet on work for one year; and, in caſe of a ſecond offence, till ſhe find ſureties never to offend again.

t Poph. 208.
u 1 Siderf. 168.
w Scobell. 121.
x See Vol. III. pag. 139.
y See Vol. I. pag. 458.
z Dalt. juſt. ch. 11.

CHAPTER THE FIFTH.

OF OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

THE law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world [a]; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each [b]. This general law is founded upon this principle, that different nations ought in time of peace to do oneanother all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests [c]. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those

a *Ff.* 1. 1. 9.

b See Vol. I. pag. 43.

c Sp. L. b. 1. c. 3.

principles of natural justice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

IN arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of it's jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of it's decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant[d], which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

BUT, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall

d See Vol. I. pag. 273.

within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

THE principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy.

I. As to the first, *violation* of *safe-conducts* or *passports*, expressly granted by the king or his embassadors [e] to the subjects of a foreign power in time of mutual war; or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of

[e] See Vol. I. pag. 260.

the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as it is one of the articles of *magna carta* [f], that foreign merchants should be entitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2 Hen. V. st. 1. c. 6. breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and impowered to hear and determine such treasons (when committed at sea) according to the antient marine law then practised in the admiral's court; and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons, when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8. and repealed by 20 Hen. VI. c. 11. but revived by 29 Hen. VI. c. 2. which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their accessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the crown. And it is farther enacted by the statute 31 Hen. VI. c. 4. that if any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obeysance, against any stranger in amity, league, or truce, or under safe-conduct; and especially by attaching

[f] 9 *Hen. III. c.* 70. See Vol. I. pag. 259, &c.

his perſon, or ſpoiling him or robbing him of his goods; the lord chancellor with any of the juſtices of either the king's-bench, or common pleas, may cauſe full reſtitution and amends to be made to the party injured.

It is to be obſerved, that the ſuſpending and repealing acts of 14 & 20 Hen. VI, and alſo the reviving act of 29 Hen. VI, were only temporary; ſo that it ſhould ſeem that, after the expiration of them all, the ſtatute 2 Hen. V. continued in full force: but yet it is conſidered as extinct by the ſtatute 14 Edw. IV. c. 4. which revives and confirms all ſtatutes and ordinances, made before the acceſſion of the houſe of York, againſt breakers of amities, truces, leagues, and ſafe-conducts, with an expreſs exception to the ſtatute of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general ſtatutes of Edward VI and queen Mary, for aboliſhing new-created treaſons; though ſir Matthew Hale ſeems to queſtion it as to treaſons committed on the ſea[g]. But certainly the ſtatute of 31 Hen. VI. remains in full force to this day.

II. As to the rights of *embaſſadors*, which are alſo eſtabliſhed by the law of nations, and are therefore matter of univerſal concern, they have formerly been treated of at large[h]. It may here be ſufficient to remark, that the common law of England recognizes them in their full extent, by immediately ſtopping all legal proceſs, ſued out through the ignorance or raſhneſs of individuals, which may intrench upon the immunities of a foreign miniſter or any of his train. And, the more effectually to enforce the law of nations in this reſpect, when violated through wantonneſs or inſolence, it is declared by the ſtatute 7 Ann. c. 12. that all proceſs whereby the perſon of any embaſſador, or of his domeſtic or domeſtic ſervant, may be arreſted, or his goods diſtreined or ſeiſed, ſhall be utterly null and void; and that all perſons proſecuting, ſoliciting, or executing ſuch proceſs, being convicted by confeſſion or the oath of one witneſs, before the

g 1 Hal. P.C. 267.

h See Vol. I. pag. 253.

lord

lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit[i]. Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. LASTLY, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to sir Edward Coke[k], *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

BY the antient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien, to be felony only: but now, since the statute of treasons, 25 Edw. III. c. 2. it is held to be only felony in a subject[l]. Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law[m]. But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Hen. VIII. c. 15. established a new jurisdiction for this purpose; which proceeds according to the course of the common law, and of which we shall say more hereafter.

i See the occasion of making this statute; Vol. I. pag. 255.

k 3 Inst. 113.

l *Ibid.*

m 1 Hawk. P.C. 98.

THE offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there[n]. But, by statute, some other offences are made piracy also: as, by statute 11 & 12 W. III. c. 7. if any natural born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And farther, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts; or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall, for each of these offences, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal, or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the statute 4 Geo. I. c. 11. expressly excludes the principals from the benefit of clergy. By the statute 8 Geo. I. c. 24. the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, though without seising or carrying her off, and destroying or throwing any of the goods over board; shall be deemed piracy: and such accessories to piracy as are described by the statute of king William, are declared to be principal pirates, and all pirates convicted by virtue of this act are made felons without benefit of clergy. By the same statutes also, (to encourage the defence of merchant vessels against pirates) the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to

n 1 Hawk. P. C. 100.

be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and ſuch wounded ſeamen ſhall be entitled to the penſion of Greenwich hoſpital; which no other ſeamen are, except only ſuch as have ſerved in a ſhip of war. And if the commander ſhall behave cowardly, by not defending the ſhip, if ſhe carries guns or arms, or ſhall diſcharge the mariners from fighting, ſo that the ſhip falls into the hands of pirates, ſuch commander ſhall forfeit all his wages, and ſuffer ſix months impriſonment. Laſtly, by ſtatute 18 Geo. II. c. 30. any natural born ſubject, or denizen, who in time of war ſhall commit hoſtilities at ſea againſt any of his fellow-ſubjects, or ſhall aſſiſt an enemy on that element, is liable to be tried and convicted as a pirate.

THESE are the principal caſes, in which the ſtatute law of England interpoſes, to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate puniſhment upon offences againſt that univerſal law, committed by private perſons. We ſhall proceed in the next chapter to conſider offences, which more immediately affect the ſovereign executive power of our own particular ſtate, or the king and government; which ſpecies of crimes branches itſelf into a much larger extent, than either of thoſe of which we have already treated.

CHAPTER THE SIXTH.

OF HIGH TREASON.

THE third general diviſion of crimes conſiſts of ſuch as more eſpecially affect the ſupreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the leaſt to a criminal neglect of that duty, which is due from every ſubject to his ſovereign. In a former part of theſe commentaries[a] we had occaſion to mention the nature of allegiance, as the tie or *ligamen* which binds every ſubject to be true and faithful to his ſovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegianec, we may remember, was diſtinguiſhed into two ſpecies: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens alſo. Every offence therefore more immediately affecting the royal perſon, his crown, or dignity, is in ſome degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by reſidence: and theſe may be diſtinguiſhed into four kinds; 1. Treaſon. 2. Felonies injurious to the king's prerogative. 3. *Praemunire*. 4. Other miſpriſions and contempts. Of which crimes the firſt and principal is that of treaſon.

[a] Book I. ch. 10.

TREASON,

TREASON, *proditio*, in it's very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the Mirror[b]: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord[c]. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears it's crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio*; being equivalent to the *crimen laesae majestatis* of the Romans, as Glanvil[d] denominates it also in our English law.

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power[e]. And yet, by the antient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into

b *c.* 1. §. 7.

c *LL. Aelfredi. c.* 4. *Aethelst. c.* 4. *Cnuti. c.* 54. 61.

d *l.* 1. *c.* 2.

e Sp. L. b. 12. c. 7.

the

the crime and punishment of treason, which never were suspected to be such. Thus the *accroaching*, or attempting to exercise, royal power (a very uncertain charge) was in the 21 Edw. III. held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l*[f]: a crime, it must be owned, well deserving of punishment: but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination[g]. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason[h]. But however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Caesar, comprehended al the antient laws, that had before been enacted to punish transgressors against the state[i]. This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "WHEN a man doth compass or imagine the death of "our lord the king, of our lady his queen, or of their eldest "son and heir." Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power and entitled to the allegiance of her subjects[j]: but the husband of such a queen is not comprized within these words, and

f 1 Hal. P. C. 80.

g Britt. c. 22. 1 Hawk. P. C. 34.

h *Qui de nece virorum illustrium, qui consiliis et consistoria nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum, cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum, puniri jura voluerint) ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis.* (Cod. 9. 8. 5.)

i Gravin. *Orig.* 1. §. 34.

j 1 Hal. P. C. 101.

and therefore no treason can be committed against him[k]. The king here intended is the king in possession, without any respect to his title: for it is held, that a king *de facto* and not *de jure*, or in other words an usurper that hath got possession of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and therefore treasons committed against Henry VI. were punished under Edward IV, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed[l]. And a very sensible writer on the crown-law carries the point of possession so far, that he holds[m], that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown, (a term, by the way, of very loose and indistinct signification) the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry

k 3 Inst. 7. 1 Hal. P. C. 106.

l 3 Inst. 7. 1 Hal. P. C. 104.

m 1 Hawk. P. C. 36.

the seventh does by no means *command* any opposition to a king *de jure*; but *excuses* the obedience paid to a king *de facto*. When therefore a usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance: otherwise, under a usurpation, no man could be safe; if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay farther, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till providence shall think fit to interpose in his favour, and decide the ambiguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is according to sir Matthew Hale no longer the object of treason [n]. And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed [o], when the fact of abdication is once established, and determined by the proper judges, the consequence necessary follows, that the throne is thereby vacant, and he is no longer king.

LET us next see, what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will [p], and not, as in common speech, the carrying such design to effect [q]. And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium*, without any traiterous intent, is no treason: as was the case of sir Walter Tyrrel, who, by the command of king William Rufus,

n 1 Hal. P. C. 104.

o Vol. I. pag. 212.

p By the antient law *compassing* or intending the death of any man, demonstrated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)

q 1 Hal. P. C. 107.

shooting

ſhooting at a hart, the arrow glanced againſt a tree, and killed the king upon the ſpot[r]. But, as this compaſſing or imagination is an act of the mind, it cannot poſſibly fall under any judicial cognizance, unleſs it be demonſtrated by ſome open, or *overt*, act. And yet the tyrant Dionyſius is recorded[s] to have executed a ſubject, barely for dreaming that he had killed him; which was held for a ſufficient proof, that he had thought thereof in his waking hours. But ſuch is not the temper of the Engliſh law; and therefore in this, and the three next ſpecies of treaſon, it is neceſſary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The ſtatute expreſsly requires, that the accuſed "be thereof upon ſufficient proof "attainted of ſome open act by men of his own condition." Thus, to provide weapons or ammunition for the purpoſe of killing the king, is held to be a palpable overt act of treaſon in imagining his death[t]. To conſpire to impriſon the king by force, and move towards it by aſſembling company, is an overt act of compaſſing the king's death[u]; for all force, uſed to the perſon of the king, in it's conſequence may tend to his death, and is a ſtrong preſumption of ſomething worſe intended than the preſent force, by ſuch as have ſo far thrown off their bounden duty to their ſovereign; it being an old obſervation, that there is generally but a ſhort interval between the priſons and the graves of princes. There is no queſtion alſo, but that taking any meaſures to render ſuch treaſonable purpoſes effectual, as aſſembling and conſulting on the means to kill the king, is a ſufficient overt act of high-treaſon[w].

How far mere *words*, ſpoken by an individual, and not relative to any treaſonable act or deſign then in agitation, ſhall amount to treaſon, has been formerly matter of doubt. We have two inſtances in the reign of Edward the fourth,

[r] 3 Inſt. 6.
[s] Plutarch. *in vit.*
[t] 3 Inſt. 12.
[u] 1 Hal. P. C. 109.
[w] 1 Hawk. P. C. 38. 1 Hal. P. C. 119.

of persons executed for treasonable words: the one a citizen of London, who said he would make his son heir of the *crown*, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases: and the chief justice Markham rather chose to leave his place than assent to the latter judgment[x]. But now it seems clearly to be agreed, that, by the common law and the statute of Edward III, words spoken amount only to a high misdemesnor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connexion with other words, and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly in 4 Car. I. on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, "that though the words were as wicked "as might be, yet they were no treason: for, unless it be "by some particular statute, no words will be treason[y]." If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for *scribere est agere*. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted it's author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached[z]; and of Algernon Sydney, for some papers found in his closet: which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt

x 1 Hal. P. C. 115.
y Cro. Car. 125.
z *Ibid.*

acts

acts of that treaſon, which was ſpecially laid in the indictment[a]. But being merely ſpeculative, without any intention (ſo far as appeared) of making any public uſe of them, the convicting the authors of treaſon upon ſuch an inſufficient foundation has been univerſally diſapproved. Peacham was therefore pardoned: and though Sidney indeed was executed, yet it was to the general diſcontent of the nation; and his attainder was afterwards reverſed by parliament. There was then no manner of doubt, but that the publication of ſuch a treaſonable writing was a ſufficient overt act of treaſon at the common law[b]; though of late even that has been queſtioned.

2. THE ſecond ſpecies of treaſon is, "if a man do violate the king's companion, or the king's eldeſt daughter "unmarried, or the wife of the king's eldeſt ſon and heir." By the king's companion is meant his wife; and by violation is underſtood carnal knowledge, as well without force, as with it: and this is high treaſon in both parties, if both be conſenting; as ſome of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any ſuſpicion of baſtardy, whereby the ſucceſſion to the crown might be rendered dubious: and therefore, when this reaſon ceaſes, the law ceaſes with it; for to violate a queen or princeſs dowager is held to be no treaſon[c]: in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vaſal vitiated the wife or daughter of his lord[d]; but not ſo, if he only vitiated his widow[e].

3. THE third ſpecies of treaſon is, "if a man do levy "war againſt our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws (*c*), or to

[a] Foſter. 198.
[b] 1 Hal. P. C. 118. 1 Hawk. P. C. 38.
[c] 3 Inſt. 9.
[d] *Feud. l.* 1. *t.* 5.
[e] *Ibid. t.* 21.

(*c*) [So an attempt by intimidation and violence to force the repeal of law, is a levying war againſt the king; and high treaſon, ſo laid down by the whole court of K. B. as clear law in the king *v.* lord George Gordon, Hill. term, 21 Geo. III. K. B. Dougl. 570.]

remove evil counsellors, or other grievances whether real or pretended[f]. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority[g]. But a tumult with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other, (in that spirit of private war, which prevailed all over Europe[h] in the early feodal times) it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Glocester in 20 Edw. I, who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemesnor[j]. A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death[i].

4. "IF a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm, or "elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the

f 1 Hawk. P. C. 37.
g 1 Hal. P. C. 132.
h Robertson Cha. V. i. 45. 286.
j 1 Hal. P. C. 136.
i 3 Inst. 9. Foster. 211. 213.

like[k]. By enemies are here underſtood the ſubjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coaſts, without any open hoſtilities between their nation and our own, and without any commiſſion from any prince or ſtate at enmity with the crown of Great Britain, the giving them any aſſiſtance is alſo clearly treaſon; either in the light of adhering to the public enemies of the king and kingdom[l], or elſe in that of levying war againſt his majeſty. And, moſt indiſputably, the ſame acts of adherence or aid, which (when applied to foreign enemies) will conſtitute treaſon under this branch of the ſtatute, will (when afforded to our own fellow-ſubjects in actual rebellion at home) amount to high treaſon under the deſcription of levying war againſt the king[m]. But to relieve a rebel, fled out of the kingdom, is no treaſon: for the ſtatute is taken ſtrictly, and a rebel is not an *enemy*; an enemy being always the ſubject of ſome foreign prince, and one who owes no allegiance to the crown of England[n]. And if a perſon be under circumſtances of actual force and conſtraint, through a well-grounded apprehenſion of injury to his life or perſon, this fear or compulſion will excuſe his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a ſafe opportunity[o].

5. "IF a man counterfeit the king's great or privy ſeal," this is alſo high treaſon. But if a man takes wax bearing the impreſſion of the great ſeal off from one patent, and fixes it to another, this is held to be only an abuſe of the ſeal, and not a counterfeiting of it: as was the caſe of a certain chaplain, who in ſuch manner framed a diſpenſation for non-reſidence. But the knaviſh artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment; on the uppermoſt of which he wrote a patent, to which he regularly obtained the great ſeal, the label going through both the ſkins. He

k 3 Inſt. 10.
l Foſter. 219.
m *Ibid.* 216.
n 1 Hawk. P. C. 38.
o Foſter. 216.

then diſſolved the cement; and taking off the written patent, on the blank ſkin wrote a freſh patent, of a different import from the former, and publiſhed it as true. This was held no counterfeiting of the great ſeal, but only a great miſpriſion; and ſir Edward Coke [p] mentions it with ſome indignation, that the party was living at that day.

6. THE ſixth ſpecies of treaſon under this ſtatute, is "if "a man counterfeit the king's money; and if a man bring "falſe money into the realm counterfeit to the money of "England, knowing the money to be falſe, to merchan- "dize and make payment withal." As to the firſt branch, counterfeiting the king's money; this is treaſon, whether the falſe money be uttered in payment or not. Alſo if the king's own minters alter the ſtandard or alloy eſtabliſhed by law, it is treaſon. But gold and ſilver money only are held to be within the ſtatute [q]. With regard likewiſe to the ſecond branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the ſtatute [r]. But of this we ſhall preſently ſay more.

7. THE laſt ſpecies of treaſon aſcertained by this ſtatute, is "if a man ſlay the chancellor, treaſurer, or the king's "juſtices of the one bench or the other, juſtices in eyre, or "juſtices of aſſiſe, and all other juſtices aſſigned to hear and "determine, being in their places doing their offices." Theſe high magiſtrates, as they repreſent the king's majeſty during the execution of their offices, are therefore for the time equally regarded by the law. But this ſtatute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends alſo only to the officers therein ſpecified; and therefore the barons of the exchequer, as ſuch, are not within the protection of this act [s]: but the lord keeper or commiſſioners of the great ſeal now ſeem to be within it, by virtue of the ſtatutes 5 Eliz. c. 18. and 1 W. & M. c. 21.

[p] 3 Inſt. 16.
[q] 1 Hawk. P. C. 42.
[r] *Ibid.* 43.
[s] 1 Hal. P. C. 231.

THUS

THUS careful was the legiſlature, in the reign of Edward the third, to ſpecify and reduce to a certainty the vague notions of treaſon, that had formerly prevailed in our courts. But the act does not ſtop here, but goes on. "Becauſe "other like caſes of treaſon may happen in time to come, "which cannot be thought of nor declared at preſent, it is "accorded, that if any other caſe ſuppoſed to be treaſon, "which is not above ſpecified, doth happen before any "judge; the judge ſhall tarry without going to judgment of "the treaſon, till the cauſe be ſhewed and declared before "the king and his parliament, whether it ought to be judg- "ed treaſon, or other felony." Sir Matthew Hale[t] is very high in his encomiums on the great wiſdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not ſuffering them to run out (upon their own opinions) into conſtructive treaſons, though in caſes that ſeem to them to have a like parity of reaſon; but reſerving them to the deciſion of parliament. This is a great ſecurity to the public, the judges, and even this ſacred act itſelf; and leaves a weighty *memento* to judges to be careful and not overhaſty in letting in treaſons by conſtruction or interpretation, eſpecially in new caſes that have not been reſolved and ſettled. 2. He obſerves, that as the authoritative deciſion of theſe *caſus omiſſi* is reſerved to the king and parliament, the moſt regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houſes, though of very reſpectable weight, is not that ſolemn declaration referred to by this act, as the only criterion for judging of future treaſons.

IN conſequence of this power, not indeed originally granted by the ſtatute of Edward III, but conſtitutionally inherent in every ſubſequent parliament, (which cannot be abridged of any rights by the act of a precedent one) the legiſlature was extremely liberal in declaring new treaſons in the unfortunate reign of king Richard the ſecond: as, particularly, the killing of an embaſſador was made ſo; which ſeems to be founded upon better reaſon than the multitude

t Hal. P. C. 259.

titude of other points, that were then ſtrained up to this high offence: the moſt arbitrary and abſurd of all which was by the ſtatute 21 Ric. II. c. 3. which made the bare purpoſe and intent of killing or depoſing the king, without any overt act to demonſtrate it, high treaſon. And yet ſo little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both depoſed and murdered. And in the firſt year of his ſucceſſor's reign, an act was paſſed [u], "reciting, "that no man knew "how he ought to behave himſelf, to do, ſpeak, or ſay, for "doubt of ſuch pains of treaſon: and therefore it was ac-"corded, that in no time to come any treaſon be judged, "otherwiſe than was ordained by the ſtatute of king Edward "the third." This at once ſwept away the whole load of extravagant treaſons introduced in the time of Richard the ſecond.

BUT afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the ſpirit of inventing new and ſtrange treaſons was revived; among which we may reckon the offences of clipping money; breaking priſon or reſcue, when the priſoner is committed for treaſon; burning houſes to extort money; ſtealing cattle by Welchmen; counterfeiting foreign coin; wilful poiſoning; execrations againſt the king; calling him opprobrious names by public writing; counterfeiting the ſign manual or ſignet; refuſing to abjure the pope; deflowering, or marrying without the royal licence, any of the king's children, ſiſters, aunts, nephews, or nieces; bare ſolicitation of the chaſtity of the queen or princeſs, or advances made by themſelves; marrying with the king, by a woman not a virgin, without previouſly diſcovering to him ſuch her unchaſte life; judging or *believing* (manifeſted by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal ſtile and title; impugning his ſupremacy; and aſſembling riotouſly to the number of twelve, and not diſperſing upon proclamation: all which new-fangled treaſons were totally abrogated by the

u Stat. 1 Hen. IV. c. 10.

ſtatute 1 Mar. c. 1. which once more reduced all treaſons to the ſtandard of the ſtatute 25 Edw. III. Since which time, though the legiſlature has been more cautious in creating new offences of this kind, yet the number is very conſiderably increaſed, as we ſhall find upon a ſhort review.

THESE new treaſons, created ſince the ſtatute 1 Mar. c. 1. and not comprehended under the deſcription of ſtatute 25 Edw. III, I ſhall comprize under three heads. 1. Such as relate to papiſts. 2. Such as relate to falſifying the coin or other royal ſignatures. 3. Such as are created for the ſecurity of the proteſtant ſucceſſion in the houſe of Hanover.

1. THE firſt ſpecies, relating to *papiſts*, was conſidered in a preceding chapter, among the penalties incurred by that branch of non-conformiſts to the national church; wherein we have only to remember, that by ſtatute 5 Eliz. c. 1. to defend the pope's juriſdiction in this realm is, for the firſt time, a heavy miſdemeſnor; and, if the offence be repeated, it is high treaſon. Alſo by ſtatute 27 Eliz. c. 2. if any popiſh prieſt, born in the dominions of the crown of England, ſhall come over hither from beyond the ſeas, unleſs driven by ſtreſs of weather [w], and departing in a reaſonable time [x]; or ſhall tarry here three days without conforming to the church, and taking the oaths; he is guilty of high treaſon. And by ſtatute 3 Jac. I. c. 4. if any natural-born ſubject be withdrawn from his allegiance, and reconciled to the pope or ſee of Rome, or any other prince or ſtate, both he and all ſuch as procure ſuch reconciliation ſhall incur the guilt of high treaſon. Theſe were mentioned under the diviſion before referred to, as ſpiritual offences, and I now repeat them as temporal ones alſo; the reaſon of diſtinguiſhing theſe overt-acts of popery from all others, by ſetting the mark of high treaſon upon them, being certainly on a civil, and not on a religious, account. For every popiſh prieſt of courſe renounces his allegiance to his temporal ſovereign upon taking orders; that being inconſiſtent with his new engagements of canonical obedience to the pope: and the ſame may be ſaid of an obſtinate defence of his authority here, or a formal re-

[w] Sir T. Raym. 377.

[x] Latch. 1.

conciliation to the see of Rome, which the statute construes to be a withdrawing from one natural allegiance; and therefore, besides being reconciled "to the pope," it also adds "or any other prince or state."

2. WITH regard to treasons relative to the *coin* or other *royal signatures*, we may recollect that the only two offences respecting the coinage; which are made treason by the statute 25 Edw. III, are the actual counterfeiting the gold and silver coin of this kingdom; or the importing such counterfeit money with intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance, by infringing the king's prerogative, and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and denomination of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falsifies this is an offender against the state, by contributing to render that public faith suspected. And upon the same reasons, by a law of the emperor Constantine [y], false coiners were declared guilty of high treason, and were condemned to be burnt alive: as, by the laws of Athens [z], all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned, that this method of reasoning is a little overstrained: counterfeiting or debasing the coin being usually practised, rather for the sake of private and unlawful lucre, than out of any disaffection to the sovereign. And therefore both this and it's kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery (in which they are followed by Glan-

y C. 9. 24. 2. *Cod. Theod. de falsa moneta. l.* 9.

z Pott. Ant. b. 1. c. 26.

vil[a], Bracton[b], and Fleta[c]) than by Constantine and our Edward the third, a species of the *crimen laesae majestatis* or high treason. For this confounds the distinction and proportion of offences; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III, the offence of counterfeiting the coin was held to be only a species of petit treason[d]: but subsequent acts in their new extensions of the offence have followed the example of that statute, and have made it equally high treason with an endeavour to subvert the government, though not quite equal in it's punishment.

IN consequence of the principle thus adopted, the statute 1 Mar. c. 1. having at one stroke repealed all intermediate treason created since the 25 Edw. III, it was thought expedient by statute 1 Mar. st. 2. c. 6. to revive two species thereof; *viz.* 1. That if any person falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2. shall falsely forge or counterfeit the sign manual, privy signet, or privy seal; such offences shall be deemed high treason. And by statute 1 & 2 P. & M. c. 11. if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by consent, as approaching the nearest to our standard, and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit it is not high treason, but another inferior offence. Clipping or defacing the genuine coin was not hitherto included in these statutes: though an offence equally pernicious to trade, and an equal

a *l.* 14. *c.* 7.
b *l.* 3. *c.* 3. §. 1 & 2.
c *l.* 1. *c.* 22.
d 1 Hal. P. C. 224.

insult

insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subjects. And therefore, among the Romans [e], defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the like sort, according to that vague conclusion, "*aliudve quid simile si admiserint.*" And now, in England, by statute 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by statute 18 Eliz. c. 1. (because "the same law, being penal, ought to be taken and expounded strictly according to the words thereof, and the like offences, not by any equity to receive the like punishment or pains") the same species of offence is therefore described in other more general words; *viz.* impairing, diminishing, falsifying, scaling, and lightening; and made liable to the same penalties. By statute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money; or shall convey the same out of the king's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason: which is by much the severest branch of the coinage law. The statute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. But all prosecutions on this act are to be commenced within *three* months after the commission of the offence: except those for making or mending any coining tool or instrument, or for marking money round the edges; which are directed to be commenced within *six* months after the offence committed [f]. And, lastly, by statute 15 & 16 Geo. II. c. 28. if any person colours or alters any shilling or sixpence, either lawful or

[e] *Ff.* 48. 4. 6.

[f] Stat. 7 Ann. c. 25.

counterfeit, to make them respectively resemble a guinea or half guinea; or any halfpenny or farthing to make them respectively resemble a shilling or sixpence; this is also high treason: but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind.

3. THE other new species of high treason is such as is created for the security of the *protestant succession* over and above such treasons against the king and government as were comprized under the statute 25 Edw. III. For this purpose, after the act of settlement was made, for transferring the crown to the illustrious house of Hanover, it was enacted by statute 13 & 14 W. III. c. 3. that the pretended prince of Wales, who was then thirteen years of age, and had assumed the title of king James III, should be attainted of high treason; and it was made high treason for any of the king's subjects by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II. c. 39. it is enacted, that if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Ann. st. 2. c. 17. if any person shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And by statute 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall be guilty

of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by statute 13 Eliz. c. 1. during the life of that princess. And after her decease it continued a high misdemesnor, punishable with forfeiture of goods and chattels, even in the most flourishing aera of indefeasible hereditary right and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before-mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet entitled *vox populi vox Dei.*"

THUS much for the crime of treason, or *laesae majestatis*, in all it's branches; which consists, we may observe, originally, in grossly counteracting that allegiance, which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this it's primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing it's punishment.

THE punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance [h], at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement [j]. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal [i].

THE king may, and often doth, discharge all the punishment, except beheading, especially where any of noble

[g] State Tr. IX. 680.

[h] 33 Ass. pl. 7.

[j] 1 Hal. P. C. 382.

[i] This punishment for treason, sir Edward Coke tells us, is warranted by divers examples in scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)

blood

blood are attainted. For, beheading being part of the judgment, that may be executed, though all the reft be omitted by the king's command [k]. But where beheading is no part of the judgment, as in murder or other felonies, it hath been faid that the king cannot change the judgment, although at the requeft of the party, from one fpecies of death to another [l]. But of this we fhall fay more hereafter [m].

In the cafe of coining, which is a treafon of a different complexion from the reft, the punifhment is milder for male offenders; being only to be drawn, and hanged by the neck till dead [n]. But in treafons of every kind the punifhment of women is the fame, and different from that of men. For, as the decency due to the fex forbids the expofing and publicly mangling their bodies, their fentence (which is to the full as terrible to fenfation as the other) is to be drawn to the gallows, and there to be burned alive [o] (*a*).

The confequences of this judgment, (attainder, forfeiture, and corruption of blood) muft be referred to the latter end of this book, when we fhall treat of them all together, as well in treafon as in other offences.

k 1 Hal. P. C. 351.
l 3 Inft. 52.
m See ch. 32.
n 1 Hal. P. C. 351.
o 2 Hal. P. C. 399.

(*a*) [But now by ftatute 30 Geo. III. c. 48. it is enacted, that the judgment to be given and awarded againft any woman convicted of the crime of high treafon, or of the crime of petit treafon, or of abetting, procuring, or counfelling any petit treafon, fhall not be that fuch woman fhall be drawn to the place of execution and be there burned to death, but that fuch woman fhall be drawn to the place of execution and be there hanged until fhe be dead. And by the fecond claufe of the faid ftatute it is enacted, that if any woman fhall be convicted of petit treafon, or of abetting, procuring, or counfelling any petit treafon, then fuch woman fhall be fubject and liable to fuch further pains and penalties as are particularly fpecified and declared with refpect to perfons convicted of wilful murder by ftatute 25 Geo. II. c. 37. and the court fhall pafs fentence at fuch time, and fhall give fuch orders with refpect to the time of execution, and all fuch other matters and things as are directed to be given by the faid act with refpect to perfons convicted of wilful murder.]

CHAPTER THE SEVENTH.

OF FELONIES INJURIOUS TO THE KING's PREROGATIVE.

AS, according to the method I have adopted, we are next to consider such felonies as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of *felony*; before we proceed upon any of the particular branches, into which it is divided.

FELONY, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies which are called clergyable, or to which the benefit of clergy extends, were antiently punished with death, in all lay, or unlearned, offenders; though now by the statute-law that punishment is for the first offence universally remitted. Treason itself, says sir Edward Coke [a], was antiently comprized under the name of felony: and in confirmation of this we may observe, that the statute of treasons, 25 Edw. III. c. 2. speaking of some dubious crimes, directs a reference to parliament;

[a] 3 Inst. 15.

that

that it may be there adjudged, "whether they be treason, or "other felony." All treasons therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that not only all offences, now capital, are in some degree or other felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; *viz.* an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word *felony*, or *felonia*, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c. but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek, φηλος, an impostor or deceiver; others from the Latin, *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology[b]; that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions a forfeiture of all the offender's lands, or goods. And this gives great probability to sir Henry Spelman's Teutonic or German derivation of it[c]: in which language indeed, as the word is clearly of feodal original, we ought rather to look for it's signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words; fee, which signifies (we well know) the fief, feud, or beneficiary estate: and lon, which signifies price or value. Felony is therefore the same as *pretium feudi*, the considera-

b 1 Inst. 391.

c Glossar. *tit. Felon.*

tion

tion for which a man gives up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. In this sense it will clearly signify the feodal forfeiture, or act by which an estate is forfeited, or escheats to the lord.

To confirm this we may observe, that it is in this sense, of forfeiture to the lord, that the feodal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates[d], are stiled *felonia* in the feodal law: "*scilicet, per* "*quas feudum amittitur*[e]." As, "*si domino deservire nolue*-"*rit*[f]; *si per annum et diem cessaverit in petenda investitura*[g]; "*si dominum ejuravit, i. e. negavit se a domino feudum habere*[h]; "*si a domino, in jus eum vocante, ter citatus non comparuerit*[i]; all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feodal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord[k]; vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e. cum uxore* "*ejus concubuerit*[l];" all these are esteemed felonies, and the latter is expresly so denominated, "*si fecerit feloniam, do*-"*minum forte cucurbitando*[m]." And as these contempts, or smaller offences, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seignory to the vasal, by the same acts as the vasal would have forfeited his feud to the lord. "*Si dominus commisit feloniam, per quam vasallus amitteret feudum* "*si eam commiserit in dominum, feudi proprietatem etiam dominus* "*perdere debet*[n]." One instance given of this sort of felony in the lord is beating the servant of his vasal, so as that he loses his service; which seems merely in the nature of a civil

[d] See Vol. II. pag. 284.

[e] *Feud. l.* 2. *t.* 16. *in calc.*

[f] *Feud. l.* 1. *t.* 21.

[g] *Feud. l.* 2. *t.* 24.

[h] *Feud. l.* 2. *t.* 34. *l.* 2. *t.* 26. §. 3.

[i] *Feud. l.* 2. *t.* 22.

[k] *Feud. l.* 2. *t.* 24. §. 2.

[l] *Feud. l.* 1. *t.* 5.

[m] *Feud. l.* 2. *t.* 38. *Britton. l.* 1. *c.* 22.

[n] *Feud. l.* 2. *t.* 26 & 47.

injury,

injury, so far as it respects the vasal. And all these felonies were to be determined "*per laudamentum sive judicium parium* "*suorum*" in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

FELONY, and the act of forfeiture to the lord, being thus synonymous terms in the feodal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small deflexion from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in antient times was held to be a species of felony; *viz.* because it induced a forfeiture.

HENCE it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny: and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods [o], an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment; which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short the true criterion of felony is forfeiture; for, as sir Edward Coke justly observes [p], in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only.

[o] 3 Inst. 43.

[p] 1 Inst. 391.

THE idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law[q] implies that it shall be punished with death, *viz.* by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have, provided the same is not expresly taken away by statute. And, in compliance herewith, I shall for the future consider it also in the same light, as a generical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death: whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I PROCEED now to consider such felonies, as are more immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of imbezzling or destroying the king's armour or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war.

1. OFFENCES relating to the *coin*, under which may be ranked some inferior misdemesnors not amounting to felony, are thus declared by a series of statutes, which I shall recite in the order of time. And, first, by statute 27 Edw. I. c. 3. none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of forfeiture of life and goods. By statute 9 Edw. III. st. 2. no sterling money shall be melted down, upon pain of forfeiture thereof.

q 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.

By ſtatute 17 Edw. III. none ſhall be ſo hardy to bring falſe and ill money into the realm, on pain of forfeiture of life and member by the perſons importing, and the ſearchers permitting ſuch importation. By ſtatute 3 Hen. V. ſt. 1. to make, coin, buy, or bring into the realm any gally-halfpence, ſuſkins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks*[r] is forfeiture of an hundred ſhillings. By ſtatute 14 Eliz. c. 3. ſuch as forge any foreign coin, although it be not made current here by proclamation, ſhall (with their aiders and abettors) be guilty of miſpriſion of treaſon: a crime which we ſhall hereafter conſider. By ſtatute 13 & 14 Car. II. c. 31. the offence of melting down any current ſilver money ſhall be puniſhed with forfeiture of the ſame, and alſo the double value: and the offender, if a freeman of any town, ſhall be disfranchiſed; if not, ſhall ſuffer ſix months impriſonment. By ſtatute 6 & 7 W. III. c. 17. if any perſon buys or ſells, or knowingly has in his cuſtody, any clippings or filings of the coin, he ſhall forfeit the ſame and 500 *l*; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By ſtatute 8 & 9 W. III. c. 26. if any perſon ſhall blanch, or whiten, copper for ſale; (which makes it reſemble ſilver) or buy or ſell or offer to ſale any malleable compoſition, which ſhall be heavier than ſilver, and look, touch, and wear like gold, but be beneath the ſtandard: or if any perſon ſhall receive or pay at a leſs rate than it imports to be of (which demonſtrates a conſciouſneſs of it's baſeneſs, and a fraudulent deſign) any counterfeit or diminiſhed milled money of this kingdom, not being cut in pieces; an operation which is expreſsly directed to be performed when any ſuch money ſhall be produced in evidence, and which any perſon, to whom any gold or ſilver money is tendered, is empowered by ſtatutes 9 & 10 W. III. c. 21. 13 Geo. III. c. 71. and 14 Geo. III. c. 70. to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform: all ſuch perſons ſhall be guilty of felony: and may be proſecuted for the ſame at any time within three months after the offence committed.

[r] Stat. 2 Hen. VI. c. 9.

But

But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemesnor at common law, it is enacted by statute 15 & 16 Geo. II. c. 28. that if any person shall utter or tender in payment any counterfeit coin, knowing it so to be, he shall for the first offence be imprisoned six months; and find sureties for his good behaviour for six months more: for the second offence, shall be imprisoned two years, and find sureties for two years longer: and, for the third offence, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money, and shall for the first offence be imprisoned one year, and find sureties for his good behaviour for two years longer; and for the second, be guilty of felony without benefit of clergy. By the same statute it is also enacted, that, if any person counterfeits the copper coin, he shall suffer two years imprisonment, and find sureties for two years more. By statute 11 Geo. III. c. 40. persons counterfeiting copper halfpence or farthings, with their abettors; or buying, selling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to be of; shall be guilty of single felony. And by a temporary statute (14 Geo. III. c. 42.) if any quantity of money, exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited in equal moieties to the crown and prosecutor. Thus much for offences relating to the coin, as well misdemesnors as felonies, which I thought it most convenient to consider in one and the same view.

2. FELONIES, against the king's *council* [a], are these. First, by statute 3 Hen. VII. c. 14. if any sworn servant of the king's houshold conspires or confederates to kill any lord of this

[a] See Vol. I. pag. 334.

realm,

realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is made felony without benefit of clergy.

3. FELONIES in *serving foreign states*, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4. which makes it felony for any person whatever to go out of the realm, to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And farther, by statute 9 Geo. II. c. 30. enforced by statute 29 Geo. II. c. 17. if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without licence under the king's sign manual, he shall be guilty of felony without benefit of clergy: but if the person, so enlisted or enticed, shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. By statute 29 Geo. II. c. 17. it is moreover enacted, that to serve under the French king, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade, in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500 *l.*

4. FELONY, by *imbezzling* or *destroying* the king's *armour* or warlike *stores*, is, in the first place, so declared to be by statute 31 Eliz. c. 4. which enacts, that if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for victualling the king's soldiers or mariners; shall, either for gain, or to impede his majesty's service, imbezzle the same

to the value of twenty ſhillings, ſuch offence ſhall be felony. And the ſtatute 22 Car. II. c. 5. takes away the benefit of clergy from this offence, and from ſtealing the king's naval ſtores to the value of twenty ſhillings; with a power for the judge, after ſentence, to tranſport the offender for ſeven years. Other inferior imbezzlements and miſdemeſnors, that full under this denomination, are puniſhed by ſtatutes 9 & 10 W. III. c. 41. 1 Geo. I. c. 25. 9 Geo. I. c. 8. & 17 Geo. II. c. 40. with fine, corporal puniſhment, and impriſonment. And by ſtatute 12 Geo. III. c. 24. to ſet on fire, burn, or deſtroy any of his majeſty's ſhips of war, whether built, building, or repairing; or any of the king's arſenals, magazines, dock-yards, rope-yards, or victualling-offices, or materials thereunto belonging; or military, naval, or victualling ſtores, or ammunition; or cauſing, aiding, procuring, abetting, or aſſiſting in, ſuch offence; ſhall be felony without benefit of clergy.

5. DESERTION from the king's armies in time of war, whether by land or ſea, in England or in parts beyond the ſeas, is by the ſtanding laws of the land (excluſive of the annual acts of parliament to puniſh mutiny and deſertion) and particularly by ſtatute 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the ſtatute 2 & 3 Edw. VI. c. 2. clergy is taken away from ſuch deſerters, and the offence is made triable by the juſtices of every ſhire. The ſame ſtatutes puniſh other inferior military offences with fines, impriſonment, and other penalties.

CHAPTER THE EIGHTH.

OF PRAEMUNIRE.

A THIRD ſpecies of offence more immediately affecting the king and his government, though not ſubject to capital puniſhment, is that of *praemunire*: ſo called from the words of the writ preparatory to the proſecution thereof; "*praemunire*[a] *facias A. B.*" cauſe A. B. to be forewarned that he appear before us to anſwer the contempt wherewith he ſtands charged; which contempt is particularly recited in the preamble to the writ[b]. It took it's original from the exorbitant power claimed and exerciſed in England by the pope, which even in the days of blind zeal was too heavy for our anceſtors to bear.

IT may juſtly be obſerved, that religious principles, which (when genuine and pure) have an evident tendency to make their profeſſors better citizens as well as better men, have (when perverted and erroneous) been uſually ſubverſive of civil government, and been made both the cloak and the inſtrument of every pernicious deſign that can be harboured in the heart of man. The unbounded authority that was exerciſed by the druids in the weſt, under the influence of pagan ſuperſtition, and the terrible ravages committed by the Saracens in the eaſt, to propagate the religion of Mahomet, both witneſs to the truth of that antient univerſal obſervation; that in all ages and in all countries, civil and eccleſiaſtical tyranny are mutually productive of each other. It is therefore the glory of the church of England, that ſhe inculcates due obedience to lawful authority, and hath been (as her prelates on

a A barbarous word for *praemoneri*. b Old *Nat. Brev.* 101. *edit.* 1534.

a trying occasion once expressed it [c]) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their doctrines and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowlege no guide but the scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their law-giver, and pride themselves in nothing more justly, than in being true members of the church, emphatically *by law* established. Whereas the notions of ecclesiastical liberty, in those who differ from them, as well in one extreme as the other, (for I here only speak of extremes) are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason and the original contract of every free state in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England, who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas the progress of the papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root, and was at length in some places with difficulty, in others never yet, extirpated. For this we might call to witness the black intrigues of the jesuits, so lately triumphant over Christendom, but now universally abandoned by even the Roman catholic powers: but the subject of our present

[c] Address to James II. 1687.

chapter

chapter rather leads us to consider the vast strides, which were formerly made in this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been defeated or converted to better purposes, by the vigour of our free constitution, and the wisdom of successive parliaments.

THE antient British church, by whomsoever planted, was a stranger to the bishop of Rome, and all his pretended authority. But the pagan Saxon invaders having driven the professors of christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in these kingdoms, till the aera of the Norman conquest: when the then reigning pontiff having favoured duke William in his projected invasion, by blessing his host and consecrating his banners, he took that opportunity also of establishing his spiritual encroachments; and was even permitted so to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates: prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in rivetting the chains of a free-born people.

THE most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant: in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enslave the consciences and minds of the people, the Romish

clergy

clergy themſelves paid the moſt implicit obedience to their own ſuperiors or prelates; and they, in their turns, were as blindly devoted to the will of the ſovereign pontiff, whoſe deciſions they held to be infallible, and his authority coextenſive with the chriſtian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulles and decretal epiſtles became the rule both of faith and diſcipline, his judgment was the final reſort in all caſes of doubt or difficulty, his decrees were enforced by anathemas and ſpiritual cenſures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exerciſe of chriſtian ordinances, and the benefits of the goſpel of God.

BUT, though the being ſpiritual head of the church was a thing of great ſound, and of greater authority, among men of conſcience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore it's attention began very early to be rivetted upon every method that promiſed pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchaſe of maſſes to redeem the ſouls of the deceaſed. New-fangled offences were created, and indulgences were ſold to the wealthy, for liberty to ſin without danger. The canon law took cognizance of crimes, injoined penance *pro ſalute animae*, and commuted that penance for money. Non-reſidence and pluralities among the clergy, and marriages among the laity related within the ſeventh degree, were ſtrictly prohibited by canon: but diſpenſations were ſeldom denied to thoſe who could afford to buy them. In ſhort, all the wealth of chriſtendom was gradually drained by a thouſand channels, into the coffers of the holy ſee.

THE eſtabliſhment alſo of the feodal ſyſtem in moſt of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for uſurping a ſimilar authority over all the preferments of the church; which began firſt in Italy, and gradually ſpread itſelf to England. The pope became a

feodal lord; and all ordinary patrons were to hold their right of patronage, under this universal superior. Estates held by feodal tenure, being originally gratuitous donations, were at that time denominated *beneficia*: their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice*. Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture, by institution from the bishop, and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vasal by his superior; and the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vasals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

At length the holy father went a step beyond any example of either emperor or feodal lord. He reserved to himself, by his own apostolical authority[d], the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again; and moreover such also as became vacant by his promotion to a bishoprick or abbey: "*etiamsi* "*ad illa personae consueverint et debuerint per electionem aut* "*quemvis alium modum assumi.*" And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feodal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of *commendams*: and papal *provisions* were the previous nomination to such benefices, by a kind of anticipation, before they be-

[d] *Extrav.* l. 3. t. 2. c. 13.

came

came actually void: though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. In consequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and adverse to the laws and constitution of England. The very nomination to bishopricks, that antient prerogative of the crown, was wrested from king Henry the first, and afterwards from his successor king John; and seemingly indeed conferred on the chapters belonging to each see: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the pope. And to sum up this head with a transaction most unparalleled and astonishing in it's kind, pope Innocent III had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vasal of the holy see, at the annual rent of a thousand marks.

ANOTHER engine set on foot, or at least greatly improved, by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and it's concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a

century after the conqueſt, and endowed, not only with the tithes of pariſhes which were raviſhed from the ſecular clergy, but alſo with lands, manors, lordſhips, and extenſive baronies. And the doctrine inculcated was, that whatever was ſo given to, or purchaſed by, the monks and friars, was conſecrated to God himſelf; and that to alienate or take it away was no leſs than the ſin of ſacrilege.

I MIGHT here have enlarged upon other contrivances, which will occur to the recollection of the reader, ſet on foot by the court of Rome, for effecting an entire exemption of it's clergy from any intercourſe with the civil magiſtrate: ſuch as the ſeparation of the eccleſiaſtical court from the temporal; the appointment of it's judges by merely ſpiritual authority, without any interpoſition from the crown; the excluſive juriſdiction it claimed over all eccleſiaſtical perſons and cauſes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or puniſhment except before their own tribunal. But the hiſtory and progreſs of eccleſiaſtical courts [e], as well as of purchaſes in mortmain [f], have already been fully diſcuſſed in the preceding volumes: and we ſhall have an opportunity of examining at large the nature of the *privilegium clericale* in the progreſs of the preſent book. And therefore I ſhall only obſerve at preſent, that notwithſtanding this plan of pontifical power was ſo deeply laid, and ſo indefatigably purſued by the unwearied politics of the court of Rome through a long ſucceſſion of ages; notwithſtanding it was poliſhed and improved by the united endeavours of a body of men, who engroſſed all the learning of Europe for centuries together; notwithſtanding it was firmly and reſolutely executed by perſons the beſt calculated for eſtabliſhing tyranny and deſpotiſm, being fired with a bigoted enthuſiaſm, (which prevailed not only among the weak and ſimple, but even among thoſe of the beſt natural and acquired endowments) unconnected with their fellow-ſubjects, and totally indifferent what might befal that poſterity to which they bore no endearing relation: —yet it vaniſhed into nothing,

e See Vol. III. pag. 61.

f See Vol. II. pag. 268.

should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. st. 2. c. 2. adds banishment and forfeiture of lands and goods: and by c. 3. of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

In the writ for the execution of all these statutes the words *praemunire facias*, being (as we said) used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *praemunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *praemunire*. It is the statute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulles, instruments, or other things which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council: or process of *praemunire facias* shall be made out against them, as in other cases of provisors.

By the statute 2 Hen. IV. c. 3. all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *praemunire*. And this is the last of our antient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised

against foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no farther attempts were afterwards made in support of these foreign jurisdictions.

A LEARNED writer, before referred to, is therefore greatly mistaken, when he says [n], that in Henry the sixth's time the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute 16 Ric. II. might be repealed; but that this motion was rejected. This account is incorrect in all it's branches. For, first, the application, which he probably means, was made not by the bishops only, but by the unamimous consent of a provincial synod, assembled in 1439, 18 Hen. VI. that very synod which at the same time refused to confirm and allow a papal bulle, which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II. in particular; but to request that the penalties thereof, which by a forced construction were applied to all that sued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only; those who appealed to Rome, or to any foreign jurisdictions: the tenor of the petition being, "that those penalties should be taken to extend only to those that commenced any suits or procured any writs or public instruments at Rome, or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion [o].

[n] Dav. 96.

[o] Wilk. *Concil. Mag. Brit. III.* 533.

AND indeed so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of it's being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, "and also to quit himself to God, and the church of this "land, of which God and the king had made him governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one, who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, 17 Hen. VI, he refused to consecrate a bishop of Ely, that was nominated by pope Eugenius IV. A conduct quite consonant to his former behaviour, in 6 Hen. VI, when he refused to obey the commands of pope Martin V, who had required him to exert his endeavours to repeal the statute of *praemunire*; ("*execrabile illud statutum*," as the holy father phrases it) which refusal so far exasperated the court of Rome against him, that at length the pope issued a bulle to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merit, that the lords spiritual, and temporal, and also the university of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king, to send an embassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome [p].

[p] See Wilk. *Concil. Mag. Br.* Vol. III. *passim.* and Dr. Duck's life of archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All Soul's college in Oxford: in vindication of whose memory the author hopes to be excused this digression; if indeed it be a digression, to shew how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were, which the statutes of *praemunire* and provisors were made to restrain.

THIS then is the original meaning of the offence, which we call *praemunire*; viz. introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal proceſs, which conſtitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of *praemunire* were indeed extended to more papal abuſes than before; as the kingdom then entirely renounced the authority of the ſee of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the ſeveral ſtatutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to ſue to Rome for any licence or diſpenſation; or to obey any proceſs from thence; are made liable to the pains of *praemunire*. And, in order to reſtore to the king in effect the nomination of vacant biſhopricks, and yet keep up the eſtabliſhed forms, it is enacted by ſtatute 25 Hen. VIII. c. 20. that if the dean and chapter refuſe to elect the perſon named by the king, or any archbiſhop or biſhop to confirm or conſecrate him, they ſhall fall within the penalties of the ſtatutes of *praemunire*. Alſo by ſtatute 5 Eliz. c. 1. to refuſe the oath of ſupremacy will incur the pains of *praemunire*; and to defend the pope's juriſdiction in this realm, is a *praemunire* for the firſt offence, and high treaſon for the ſecond. So too, by ſtatute 13 Eliz. c. 2. to import any *agnus Dei*, croſſes, beads, or other ſuperſtitious things pretended to be hallowed by the biſhop of Rome, and tender the ſame to be uſed; or to receive the ſame with ſuch intent, and not diſcover the offender; or if a juſtice of the peace, knowing thereof, ſhall not within fourteen days declare it to a privy counſellor; they all incur a *praemunire*. But importing or ſelling maſs-books, or other popiſh books, is by ſtatute 3 Jac. I. c. 5. §. 25. only liable to a penalty of forty ſhillings. Laſtly, to contribute to the maintenance of a jeſuit's college, or any popiſh ſeminary whatever, beyond ſea; or any perſon in the ſame; or to contribute to the maintenance of any jeſuit or popiſh prieſt in England, is by ſtatute 27 Eliz. c. 2. made liable to the penalties of *praemunire*.

THUS far the penalties of *praemunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the pope: but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more, and some less relation to this original offence, and some no relation at all.

THUS, 1. By the statute 1 & 2 Ph. & Mar. c. 8. to molest the possessors of abbey lands granted by parliament to Henry the eighth, and Edward the sixth, is a *praemunire*. 2. So likewise is the offence of acting as a broker or agent in any usurious contract, where above ten *per cent.* interest is taken, by statute 13 Eliz. c. 10. 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *praemunire*, by statute 21 Jac. I. c. 3. 4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *praemunire* by two statutes: the one 16 Car. I. c. 21. the other 1 Jac. II. c. 8. 5. On the abolition, by statute 12 Car. II. c. 24. of purveyance [q], and the prerogative of pre-emption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *praemunire*. 6. To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *praemunire* by statute 13 Car. II. c. 1. 7. By the *habeas corpus* act also, 31 Car. II. c. 2. it is a *praemunire*, and incapable of the king's pardon, besides other heavy penalties [r], to send any subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. & M. st. 1. c. 8. persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *praemunire*; and by statute 7 &

[q] See Vol. I. pag. 287.

[r] See Vol. I. pag. 138. Vol. III. pag. 137.

8 W. III. c. 24. ferjeants, counfellors, proctors, attorneys, and all officers of courts, practifing without having taken the oaths of allegiance and fupremacy, and fubfcribed the declaration againft popery, are guilty of a *praemunire*, whether the oaths be tendered or no. 9. By the ftatute 6 Ann. c. 7. to affert malicioufly and directly, by preaching, teaching, or advifed fpeaking, that the then pretended prince of Wales, or any perfon other than according to the acts of fettlement and union, hath any right to the throne of thefe kingdoms; or that the king and parliament cannot make laws to limit the defcent of the crown; fuch preaching, teaching, or advifed fpeaking is a *praemunire:* as writing, printing, or publifhing the fame doctrines amounted, we may remember, to high treafon. 10. By ftatute 6 Ann. c. 23. if the affembly of peers of Scotland, convened to elect their fixteen reprefentatives in the Britifh parliament, fhall prefume to treat of any other matter fave only the election, they incur the penalties of a *praemunire*. 11. The ftatute 6 Geo. I. c. 18. (enacted in the year after the infamous fouth fea project had beggared half the nation) makes all unwarrantable undertakings by unlawful fubfcriptions, then commonly known by the name of bubbles, fubject to the penalties of a *praemunire*. 12. The ftatute 12 Geo. III. c. 11. fubjects to the penalties of the ftatute of *praemunire* all fuch as knowingly and wilfully folemnize, affift, or are prefent at, any forbidden marriage of fuch of the defcendants of the body of king George II, as are by that act prohibited to contract matrimony without the confent of the crown [s].

HAVING thus inquired into the nature and feveral fpecies of *praemunire*, it's punifhment may be gathered from the foregoing ftatutes, which are thus fhortly fummed up by fir Edward Coke [t]: "that, from the conviction, the defendant "fhall be out of the king's protection, and his lands and te- "nements, goods and chattels, forfeited to the king: and "that his body fhall remain in prifon *at the king's pleafure;*

[s] See book I. ch. 4.   [t] 1 Inft. 129.

"or (as other authorities have it) *during life*[u]:" both which amount to the ſame thing; as the king by his prerogative may any time remit the whole, or any part, of the puniſhment, except in the caſe of tranſgreſſing the ſtatute of *habeas corpus*. Theſe forfeitures, here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular ſtatutes, and not by the common law. But ſo odious, ſir Edward Coke adds, was this offence of *praemunire*, that a man that was attainted of the ſame might have been ſlain by any other man without danger of law: becauſe it was provided by law[w], that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the poſition itſelf, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for neceſſary ſelf-defence. And to obviate ſuch ſavage and miſtaken notions[x], the ſtatute 5 Eliz. c. 1. provides, that it ſhall not be lawful to kill any perſon attainted in a *praemunire*, any law, ſtatute, opinion, or expoſition of law to the contrary notwithſtanding. But ſtill ſuch delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious ſoever, being ſo far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may ſuffer. And no man, knowing him to be guilty, can with ſafety give him comfort, aid, or relief[y].

[u] 1 Bulſt. 199.

[w] Stat. 25 Edw. III. ſt. 5. c. 22.

[x] Bro. *Abr. t. corone*, 196.

[y] 1 Hawk. P. C. 55.

CHAPTER THE NINTH.

OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

THE fourth species of offences, more immediately against the king and government, are entitled misprisions and contempts.

MISPRISIONS (a term derived from the old French, *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only [a]. And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemesnor: as happened in the case of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Essex's rebellion [b]. Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

[a] Yearb. 2 *Ric. III.* 10. Staundf. P.C. 37. Kel. 71. 1 Hal. P. C. 374. 1 Hawk. P. C. 55, 56.

[b] Hudson of the court of star-chamber. *MS. in Mus. Brit.*

I. Of the first, or negative kind, is what is called *misprision of treason*; consisting in the bare knowlege and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowlege of a plot against the state, and not revealing it, was a capital crime at Florence, and other states of Italy[c]. But it is now enacted by the statute 1 & 2 Ph. & Mar. c. 10. that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal, if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assise or justice of the peace[d]. But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing before hand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason[e].

There is also one positive misprision of treason, created so by act of parliament. The statute 13 Eliz. c. 2. enacts, that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprision of treason. For, though the law would not put foreign coin upon quite the same footing as our own; yet, if the circumstances of trade concur, the falsifying it may be attended with consequences almost equally pernicious to the public; as the counterfeiting of Portugal money would be at present: and therefore the law has made it an offence just below capital, and that is all. For the punishment of misprision of treason is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life[f]. Which total forfeiture of the goods was originally inflicted while the

c Guicciard. Hist. b. 3 & 13.
d 1 Hal. P. C. 372.
e 1 Hawk. P. C. 56.
f 1 Hal. P. C. 374.

the offence amounted to principal treaſon, and of courſe included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter [g], that wherever an offence is puniſhed by ſuch total forfeiture it is felony at the common law.

MISPRISION *of felony* is alſo the concealment of a felony which a man knows, but never aſſented to; for if he aſſented, this makes him either principal or acceſſory. And the puniſhment of this, in a public officer, by the ſtatute Weſtm. 1. 3 Edw. I. c. 9. is impriſonment for a year and a day; in a common perſon, impriſonment for a leſs diſcretionary time; and, in both, fine and ranſom at the king's pleaſure: which pleaſure of the king muſt be obſerved, once for all, not to ſignify any extrajudicial will of the ſovereign, but ſuch as is declared by his repreſentatives, the judges in his courts of juſtice; "*voluntas regis in curia, non in camera* [h]."

THERE is alſo another ſpecies of negative miſpriſions: namely, the *concealing of treaſure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly puniſhable by death [j]; but now only by fine and impriſonment [i].

II. MISPRISIONS, which are merely poſitive, are generally denominated *contempts* or *high miſdemeſnors*; of which

1. THE firſt and principal is the *mal-adminiſtration* of ſuch high officers, as are in public truſt and employment. This is uſually puniſhed by the method of parliamentary impeachment: wherein ſuch penalties, ſhort of death, are inflicted, as to the wiſdom of the houſe of peers ſhall ſeem proper; conſiſting uſually of baniſhment, impriſonment, fines, or perpetual diſability. Hitherto alſo may be referred the

g See pag. 94.

h 1 Hal. P. C. 375.

j Glanv. *l.* 1. *c.* 2.

i 3 Inſt. 133.

offence

offence of *imbezzling the public money*, called among the Romans *peculatus*, which the Julian law puniſhed with death in a magiſtrate, and with deportation, or baniſhment, in a private perſon [k]. With us it is not a capital crime, but ſubjects the committer of it to a diſcretionary fine and impriſonment. Other miſpriſions are, in general, ſuch contempts of the executive magiſtrate, as demonſtrate themſelves by ſome arrogant and undutiful behaviour towards the king and government. Theſe are

2. CONTEMPTS againſt the king's *prerogative*. As, by refuſing to aſſiſt him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by perſonal ſervice for defence of the realm, againſt a rebellion or invaſion [l]. Under which claſs may be ranked the neglecting to join the *poſſe comitatus*, or power of the county, being thereunto required by the ſheriff or juſtices, according to the ſtatute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel [m]. Contempts againſt the prerogative may alſo be, by preferring the intereſts of a foreign potentate to thoſe of our own, or doing or receiving any thing that may create an undue influence in favour of ſuch extrinſic power; as, by taking a penſion from any foreign prince without the conſent of the king [n]. Or, by diſobeying the king's lawful commands; whether by writs iſſuing out of his courts of juſtice, or by a ſummons to attend his privy council, or by letters from the king to a ſubject commanding him to return from beyond the ſeas, (for diſobedience to which his lands ſhall be ſeiſed till he does return, and himſelf afterwards puniſhed) or by his writ of *ne exeat regnum*, or proclamation, commanding the ſubject to ſtay at home [o]. Diſobedience to any of theſe commands is a high miſpriſion and contempt: and ſo, laſtly, is diſobedience to any act of parliament, where no particular penalty is aſſigned; for then it is puniſhable, like the reſt of

k *Inſt*. 4. 18. 3.
l 1 Hawk. P. C. 59.
m Lamb. Eir. 315.
n 3 Inſt. 144.
o See Vol. I. pag. 266.

these contempts, by fine and imprisonment, at the discretion of the king's courts of justice [p].

3. CONTEMPTS and misprisions against the king's *person* and *government*, may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die: these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory or other infamous corporal punishment [q]: in like manner as, in the antient German empire, such persons as endeavoured to sow sedition, and disturb the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I. and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank [r].

4. CONTEMPTS against the king's *title*, not amounting to treason or *praemunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen [s] that it amounts to a *praemunire*. This heedless species of contempt is however punished by our law with fine and imprisonment. Likewise if any person shall in any wise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemesnor, by statute 13 Eliz. c. 1. and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government; and yet act-

p 1 Hawk. P. C. 60.

q *Ibid.*

r Mod. Un. Hist. xxix. 28, 119.

s See pag. 91.

ing

ing in a public office, place of truſt, or other capacity, for which the ſaid oaths are required to be taken; *viz.* thoſe of allegiance, ſupremacy, and abjuration; which muſt be taken within ſix calendar months after admiſſion. The penalties for this contempt, inflicted by ſtatute 1 Geo. I. ſt. 2. c. 13. are very little, if any thing, ſhort of thoſe of a *praemunire*: being an incapacity to hold the ſaid offices, or any other; to proſecute any ſuit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender ſhall alſo forfeit 500*l* to him or them that will ſue for the ſame. Members on the foundation of any college in the two univerſities, who by this ſtatute are bound to take the oaths, muſt alſo regiſter a certificate thereof in the college regiſter, within one month after; otherwiſe, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a perſon to ſucceed him by his great ſeal or ſign manual. Beſides thus taking the oaths for offices, any two juſtices of the peace may by the ſame ſtatute ſummon, and tender the oaths to, any perſon whom they ſhall ſuſpect to be diſaffected; and every perſon refuſing the ſame, who is properly called a non-juror, ſhall be adjudged a popiſh recuſant convict, and ſubjected to the ſame penalties that were mentioned in a former chapter[t]; which in the end may amount to the alternative of abjuring the realm, or ſuffering death as a felon.

5. CONTEMPTS againſt the king's *palaces* or *courts of juſtice* have been always looked upon as high miſpriſions: and by the antient law, before the conqueſt, fighting in the king's palace, or before the king's judges, was puniſhed with death[v]. So too, in the old Gothic conſtitution, there were many places privileged by law, *quibus major reverentia et ſecuritas debetur, ut templa et judicia, quae ſancta habebantur,—arces et aula regis,—denique locus quilibet praeſente aut adventante rege*[u]. And at preſent, with us, by the ſtatute

[t] See pag. 55.

[v] 3 Inſt. 140. *LL. Alured. cap.* 7, & 34.

[u] Stiernh. *de jure Goth. l.* 3. *c.* 3.

33 Hen.

33 Hen. VIII. c. 12. malicious ſtriking in the king's palace, wherein his royal perſon reſides, whereby blood is drawn, is puniſhable by perpetual impriſonment, and fine at the king's pleaſure; and alſo with loſs of the offender's right hand, the ſolemn execution of which ſentence is preſcribed in the ſtatute at length.

BUT *ſtriking* in the king's ſuperior courts of juſtice, in Weſtminſter-hall, or at the aſſiſes, is made ſtill more penal than even in the king's palace. The reaſon ſeems to be, that thoſe courts being antiently held in the king's palace, and before the king himſelf, ſtriking there included the former contempt againſt the king's palace, and ſomething more; *viz.* the diſturbance of public juſtice. For this reaſon, by the antient common law before the conqueſt [w], ſtriking in the king's courts of juſtice, or drawing a ſword therein, was a capital felony: and our modern law retains ſo much of the antient ſeverity as only to exchange the loſs of life for the loſs of the offending limb. Therefore a ſtroke or blow in ſuch a court of juſtice, whether blood be drawn or not, or even aſſaulting a judge ſitting in the court, by drawing a weapon, without any blow ſtruck, is puniſhable with the loſs of the right hand, impriſonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life [x]. A *reſcue* alſo of a priſoner from any of the ſaid courts, without ſtriking a blow, is puniſhed with perpetual impriſonment, and forfeiture of goods, and of the profits of lands during life [y]: being looked upon as an offence of the ſame nature with the laſt; but only, as no blow is actually given, the amputation of the hand is excuſed. For the like reaſon an affray, or riot, near the ſaid courts, but out of their actual view, is puniſhed only with fine and impriſonment [z].

[w] *LL. Inae. c.* 6. *LL. Canut. c.* 56. *LL. Alured. c.* 7.

[x] Staund. P. C. 38. 3 Inſt. 140, 141.

[y] 1 Hawk. P. C. 57.

[z] Cro. Car. 373.

NOT

NOT only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment[a]. And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is punishable with a fine by the judges there sitting; as by the steward in a court-leet, or the like[b].

LIKEWISE all such, as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty[c]: which offences, when they proceeded farther than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods[d].

LASTLY, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute; (all of which are impediments of justice) are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And antiently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony; and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision[e], and liable to be fined and imprisoned[f].

[a] Cro. Car. 503.
[b] 1 Hawk. P. C. 58.
[c] 3 Inst. 141, 142.
[d] Stiernh. *de jure Goth.* l, 3. c. 3.
[e] See Barr. 212. 27 Ass. pl. 44. §. 4. fol. 138.
[f] 1 Hawk. P. C. 59.

CHAPTER THE TENTH.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our distribution will next lead us to take into consideration such crimes and misdemesnors as more especially affect the *common-wealth*, or public polity of the kingdom: which however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offences against the king, as the *pater-familias* of the nation: to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent presumed and proved by immemorial usage.

THE species of crimes, which we have now before us, is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offences, and to the punishments inflicted by law for each particular offence; with now and then a few incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail, than is consistent with the plan of these commentaries.

THE crimes and misdemesnors, that more especially affect the common-wealth, may be divided into five species; *viz.*

offences against public *justice*, against the public *peace*, against public *trade*, against the public *health*, and against the public *police* or *oeconomy*: of each of which we will take a cursory view in their order.

FIRST then, of offences against public *justice*: some of which are felonious, whose punishment may extend to death; others only misdemesnors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. IMBEZZLING or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted by statute 8 Hen. VI. c. 12. that if any clerk, or other person, shall wilfully take away, withdraw, or avoid any record, or process in the superior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it shall be felony not only in the principal actors, but also in their procurers and abettors. And this may be tried either in the king's bench or common pleas, by a jury *de medietate;* half, officers of any of the superior courts, and the other half common jurors. Likewise by statute 21 Jac. I. c. 26. to acknowlege any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves: but by statute 4 W. & M. c. 4. to personate any other person (as bail) before any judge of assize or other commissioner authorized to take bail in the country, is also felony. For no man's property would be safe, if records might be suppressed or falsified, or persons names be falsely usurped in courts, or before their public officers.

2. To prevent abuses by the extensive power, which the law is obliged to repose in gaolers, it is enacted by statute 14 Edw. III. c. 10. that if any *gaoler* by too great duress of imprisonment makes any prisoner, that he hath in ward, become

come an *approver* or an *appellor* againſt his will; that is, as we ſhall ſee hereafter, to accuſe and turn evidence againſt ſome other perſon; it is felony in the gaoler. For, as ſir Edward Coke obſerves [a], it is not lawful to induce or excite any man even to a juſt accuſation of another; much leſs to do it by dureſs of impriſonment; and leaſt of all by a gaoler, to whom the priſoner is committed for ſafe cuſtody.

3. A THIRD offence againſt public juſtice is *obſtructing* the execution of lawful *proceſs*. This is at all times an offence of a very high and preſumptuous nature; but more particularly ſo, when it is an obſtruction of an arreſt upon criminal proceſs. And it hath been holden, that the party oppoſing ſuch arreſt becomes thereby *particeps criminis*; that is, an acceſſory in felony, and a principal in high treaſon [b]. Formerly one of the greateſt obſtructions to public juſtice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent perſons aſſembled together to ſhelter themſelves from juſtice, (eſpecially in London and Southwark) under the pretext of their having been antient palaces of the crown, or the like [c]: all of which ſanctuaries for iniquity are now demoliſhed, and the oppoſing of any proceſs therein is made highly penal, by the ſtatutes 8 & 9 Will. III. c. 27. 9 Geo. I. c. 28. and 11 Geo. I. c. 22. which enact, that perſons oppoſing the execution of any proceſs in ſuch pretended privileged places within the bills of mortality, or abuſing any officer in his endeavours to execute his duty therein, ſo that he receives bodily hurt, ſhall be guilty of felony, and tranſported for ſeven years: and perſons in diſguiſe, joining in or abetting any riot or tumult on ſuch account, or oppoſing any proceſs, or aſſaulting and abuſing any officer executing or for having executed the ſame, ſhall be felons without benefit of clergy.

4. AN *eſcape* of a perſon arreſted upon criminal proceſs, by eluding the viligance of his keepers before he is put in hold, is alſo an offence againſt public juſtice, and the party himſelf is puniſhable by fine or impriſonment [d]. But the officer per-

[a] 3 Inſt. 91.

[b] 1 Hawk. P. C. 121.

[c] Such as *White-Friers*, and it's environs; the *Savoy*; and the *Mint* in Southwark.

[d] 2 Hawk. P. C. 122.

mitting ſuch eſcape, either by negligence or connivance, is much more culpable than the priſoner; the natural deſire of liberty pleading ſtrong in his behalf, though he ought in ſtrictneſs of law to ſubmit himſelf quietly to cuſtody, till cleared by the due courſe of juſtice. Officers therefore who, after arreſt, *negligently* permit a felon to eſcape, are alſo puniſhable by fine [e]: but *voluntary* eſcapes, by conſent and connivance of the officer, are a much more ſerious offence: for it is generally agreed that ſuch eſcapes amount to the ſame kind of offence, and are puniſhable in the ſame degree, as the offence of which the priſoner is guilty, and for which he is in cuſtody, whether treaſon, felony, or treſpaſs. And this whether he were actually committed to gaol, or only under a bare arreſt [f]. But the officer cannot be thus puniſhed, till the original delinquent hath actually received judgment or been attainted upon verdict, confeſſion, or outlawry, of the crime for which he was ſo committed or arreſted: otherwiſe it might happen, that the officer might be puniſhed for treaſon or felony, and the perſon arreſted and eſcaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and impriſoned for a miſdemeſnor [g].

5. BREACH of priſon by the offender himſelf, when committed for any cauſe, was felony at the common law [h]: or even conſpiring to break it [i]. But this ſeverity is mitigated by the ſtatute *de frangentibus priſonam*, 1 Edw. II. which enacts, that no perſon ſhall have judgment of life or member for breaking priſon, unleſs committed for ſome capital offence. So that to break priſon and eſcape, when lawfully committed for any treaſon or felony, remains ſtill felony as at the common law; and to break priſon, (whether it be the county gaol, the ſtocks, or other uſual place of ſecurity) when lawfully confined upon any other inferior charge, is ſtill puniſhable as a high miſdemeſnor by fine and impriſonment. For the ſtatute, which ordains that ſuch offence ſhall be no

e 1 Hal. P. C. 600.

f 1 Hal. P. C. 590. 2 Hawk. P. C. 134.

g 1 Hal. P. C. 588, 9. 2 Hawk. P. C. 134, 5.

h 1 Hal. P. C. 607.

i Bract. *l.* 3. *c.* 9.

longer

longer capital, never meant to exempt it entirely from every degree of punishment[j].

6. RESCUE is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue therefore of one apprehended for felony, is felony; for treason, treason; and for a misdemesnor, a misdemesnor also. But here likewise, as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished: and for the same reason; because perhaps in fact it may turn out that there has been no offence committed[k]. By statute 11 Geo. II. c. 26. and 24 Geo. II. c. 40. if five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. By the statute 16 Geo. II. c. 31. to convey to any prisoner in custody for treason or felony any arms, instruments of escape, or disguise, without the knowlege of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years: or if the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt of 100*l*, it is then a misdemesnor, punishable with fine and imprisonment. And by several special statutes[l], to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy; and to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offences against the black-act, 9 Geo. I. c. 22. and, being required by order of the privy council to surrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet, or succour him, are felons without benefit of clergy.

j 2 Hawk. P. C. 128.

k 1 Hal. P. C. 607. Fost. 344.

l 6 Geo. I. c. 23. (Transportation.) 9 Geo. I. c. 22. (Black-act.) 8 Geo. II. c. 20. (Destroying turnpikes, &c.) 19 Geo. II. c. 34. (Smuggling.) 25 Geo. II. c. 37. (Murder.) 27 Geo. II. c. 15. (Black-act.)

7. ANOTHER capital offence against public justice is the *returning from transportation*, or being seen at large in Great Britain, before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself. This is made felony without benefit of clergy in all cases, by statutes 4 Geo. I. c. 11. 6 Geo. I. c. 23. 16 Geo. II. c. 15. and 8 Geo. III. c. 15. as is also the assisting them to escape from such as are conveying them to the port of transportation.

8. AN eighth is that of *taking a reward*, under pretence of *helping* the owner to his *stolen goods*. This was a contrivance carried to a great length of villany in the beginning of the reign of George the first: the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all farther inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves who brought in all their spoils to him; and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. I. c. 11. that whoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against them. Wild, still continuing in his old practice, was upon this statute at last convicted and executed [m].

9. RECEIVING of stolen goods, *knowing them to be stolen*, is also a high misdemesnor and affront to public justice. We have seen in a former chapter [n], that this offence, which is only a misdemesnor at common law, by the statutes 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offender accessory to the theft and felony. But because the accessory cannot in general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted by statute 1 Ann. c. 9. and 5 Ann. c. 31. that such receivers may still be prosecuted for a misdemesnor, and punished by fine and imprisonment, though the principal felon be not before taken

m See stat. 6 Geo. I. c. 23. §. 9.   n See pag. 38.

ſo as to be proſecuted and convicted. And, in caſe of receiving ſtolen lead, iron, and certain other metals, ſuch offence is by ſtatute 29 Geo. II. c. 30. puniſhable by tranſportation for fourteen years [o]. So that now the proſecutor has two methods in his choice: either to puniſh the receivers for the miſdemeſnor immediately, before the thief is taken [p]; or to wait till the felon is convicted, and then puniſh them as acceſſories to the felony. But it is provided by the ſame ſtatutes, that he ſhall only make uſe of one, and not both of theſe methods of puniſhment. By the ſame ſtatute alſo 29 Geo. II. c. 30. perſons having lead, iron, and other metals in their cuſtody, and not giving a ſatisfactory account how they came by the ſame, are guilty of a miſdemeſnor and puniſhable by fine or impriſonment. And by ſtatute 10 Geo. III. c. 48. all knowing receivers of ſtolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the ſtealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of cuſtody; and, if convicted, ſhall be adjudged guilty of felony, and tranſported for fourteen years [A].

10. OF a nature ſomewhat ſimilar to the two laſt is the offence of *theft-bote*, which is where the party robbed not only knows the felon, but alſo takes his goods again, or other amends,

[o] See alſo ſtatute 2 Geo. III. c. 28. §. 12. for the puniſhment of receivers of goods ſtolen by bum-boats, &c. in the Thames.

[p] Foſter. 373.

[A] By ſtatute 21 Geo. III. c. 68. the receiving any ſtolen copper, braſs, bell-metal, or utenſil fixed to any building, or any iron rails or fencing ſet up in any court or other place, is made tranſportation for ſeven years, or three years impriſonment to be kept to hard labour.

By ſtatute 21 Geo. III. c. 69. the receiving ſtolen pewter of any kind is ſubjected to the like penalty, altho' the principal has not been convicted.

By 22 Geo. III. c. 58. the receiving any ſtolen goods (except lead, iron, copper, braſs, bell-metal and ſolder) is made a miſdemeanour, puniſhable by fine and impriſonment, or whipping, as the court ſhall appoint; which ſhall exempt the offender from being puniſhed as acceſſory, altho' the principal be afterwards convicted, and the offence ſhall appear to be grand larceny, or ſome greater offence.

amends, upon agreement not to prosecute. This is frequently called compounding of felony, and formerly was held to make a man an accessory; but is now punished only with fine and imprisonment[q]. This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "*latroni eum similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere*[r]." By statute 25 Geo. II. c. 36. even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50 *l.* each.

11. COMMON *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise[s]. The punishment for this offence, in a common person, is by fine and imprisonment: but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future[t]. And indeed it is enacted by statute 12 Geo. I. c. 29. that if any one, who hath been convicted of forgery, perjury, subornation of perjury, or common barretry, shall practise as an attorney, solicitor, or agent, in any suit; the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence, of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff: either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2. to be punished by six months imprisonment, and treble damages to the party injured.

12. MAINTENANCE is an offence, that bears a near relation to the former; being an officious intermeddling in a suit that

q 1 Hawk. P. C. 125.

r Stiernh. *de jure Goth. l.* 3. *c.* 5.

s 1 Hawk. P. C. 243.

t *Ibid.* 244.

that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it [u]: a practice that was greatly encouraged by the first introduction of uses [w]. This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage [x]. A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment [y]; and by the statute 32 Hen. VIII. c. 9. a forfeiture of ten pounds.

13. CHAMPERTY, *campi-partitio*, is a species of maintenance, and punished in the same manner [z]: being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expence [a]. Thus *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law: "*qui* "*improbe coeunt in alienam litem, ut quicquid ex condemna*"*tione in rem ipsius redactum fuerit inter eos communicaretur,* "*lege Julia de vi privata tenentur* [b];" and they were punished by the forfeiture of a third part of their goods, and perpe-

u Hawk. P. C. 249.
w Dr & St. 203.
x *Ff.* 48. 10. 20.
y 1 Hawk. P. C. 255.
z *Ibid.* 257.
a Stat. of conspirat. 33 Edw. I.
b *Ff.* 48. 7. 6.

tual infamy. Hitherto alſo muſt be referred the proviſion of the ſtatute 32 Hen. VIII. c. 9. that no one ſhall ſell or purchaſe any pretended right or title to land, unleſs the vendor hath received the profits thereof for one whole year before ſuch grant, or hath been in actual poſſeſſion of the land, or of the reverſion or remainder; on pain that both purchaſor and vendor ſhall each forfeit the value of ſuch land to the king and the proſecutor. Theſe offences relate chiefly to the commencement of *civil* ſuits: but

14. THE *compounding of informations* upon penal ſtatutes are an offence of an equivalent nature in *criminal* cauſes; and are, beſides, an additional miſdemeſnor againſt public juſtice, by contributing to make the laws odious to the people. At once therefore to diſcourage malicious informers, and to provide that offences, when once diſcovered, ſhall be duly proſecuted, it is enacted by ſtatute 18 Eliz. c. 5. that if any perſon, informing under pretence of any penal law, makes any compoſition without leave of the court, or takes any money or promiſe from the defendant to excuſe him, (which demonſtrates his intent in commencing the proſecution to be merely to ſerve his own ends, and not for the public good) he ſhall forfeit 10 *l*, ſhall ſtand two hours on the pillory, and ſhall be for ever diſabled to ſue on any popular or penal ſtatute.

15. A CONSPIRACY alſo to indict an innocent man of felony falſely and maliciouſly, who is accordingly indicted and acquitted, is a farther abuſe and perverſion of public juſtice; for which the party injured may either have a civil action by writ of conſpiracy, (of which we ſpoke in the preceding book [c]) or the conſpirators, for there muſt be at leaſt two to form a conſpiracy, may be indicted at the ſuit of the king, and were by the antient common law [d] to receive what is called the *villenous* judgment; *viz.* to loſe their *liberam legem*, whereby they are diſcredited and diſabled as jurors or witneſſes; to forfeit their goods and chattels, and lands for life; to have thoſe lands waſted, their houſes raſed, their trees rooted up, and their own bodies committed to priſon [e]. But it now is the better opinion, that the villenous judgment is by long

c See Vol III. pag. 126.

d Bro. *Abr. t. conſpiracy.* 28.

e 1 Hawk. P. C. 193.

diſuſe

disuse become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory. To this head may be referred the offence of sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 Geo. II. c. 24. at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

16. THE next offence against public justice is when the suit is past it's commencement, and come to trial. And that is the crime of wilful and corrupt *perjury;* which is defined by sir Edward Coke [f], to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently *in foro conscientiae* incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be corrupt, (that is, committed *malo animo*) wilful, positive, and absolute; not upon surprize, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before-mentioned. *Subornation* of perjury is the offence of procuring another to

[f] 3 Inst. 164.

take

take ſuch a falſe oath, as conſtitutes perjury in the principal. The puniſhment of perjury and ſubornation, at common law, has been various. It was antiently death; afterwards baniſhment, or cutting out the tongue; then forfeiture of goods; and now it is fine and impriſonment, and never more to be capable of bearing teſtimony[g]. But the ſtatute 5 Eliz. c. 9. (if the offender be proſecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40 *l.* on the ſuborner: and in default of payment, impriſonment for ſix months, and to ſtand with both ears nailed to the pillory. Perjury itſelf is thereby puniſhed with ſix months impriſonment, perpetual infamy, and a fine of 20*l*, or to have both ears nailed to the pillory. But the proſecution is uſually carried on for the offence at common law; eſpecially as, to the penalties before inflicted, the ſtatute 2 Geo. II. c. 25. ſuperadds a power, for the court to order the offender to be ſent to the houſe of correction for a term not exceeding ſeven years, or to be tranſported for the ſame period; and makes it felony without benefit of clergy to return or eſcape within the time. It has ſometimes been wiſhed, that perjury, at leaſt upon capital accuſations, whereby another's life has been or might have been deſtroyed, was alſo rendered capital, upon a principal of retaliation; as it is in all caſes by the laws of France[h]. And certainly the odiouſneſs of the crime pleads ſtrongly in behalf of the French law. But it is to be conſidered, that there they admit witneſſes to be heard only on the ſide of the proſecution, and uſe the rack to extort a confeſſion from the accuſed. In ſuch a conſtitution therefore it is neceſſary to throw the dread of capital puniſhment into the other ſcale, in order to keep in awe the witneſſes for the crown; on whom alone the priſoner's fate depends; ſo naturally does one cruel law beget another. But corporal and pecuniary puniſhments, exile, and perpetual infamy, are more ſuited to the genius of the Engliſh law: where the fact is openly diſcuſſed between witneſſes on *both* ſides, and the evidence for the crown may be contradicted and diſproved by thoſe of the priſoner. Where

g 3 Inſt. 163.

h Monteſq. Sp. L. b. 29. c. 11.

indeed

indeed the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment: which our antient law in fact inflicted [i]. But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should; much less that this crime should in *all* judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted: and therefore it seems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law, which has adopted the opinion of Cicero [k], derived from the law of the twelve tables, "*perjurii poena* "*divina, exitium; humana, dedecus.*"

17. BRIBERY is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office [l]. In the east it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice, yet, by a strange indulgence in one instance, it tacitly encouraged this practice; allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year [m]: not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic [n],

[i] Britton. c. 5.
[k] *de Leg.* 2. 9.
[l] 1 Hawk. P. C. 168.
[m] *Ff.* 48. 11. 6.
[n] *de Leg. l.* 12.

orders those who take presents for doing their duty to be punished in the severest manner: And by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe[o]. In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same[p]. But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the chief justice Thorp was hanged for it in the reign of Edward III. By a statute[q] 11 Hen. IV. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice.

18. EMBRACERY is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like[r]. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

19. THE *false verdict* of jurors, whether occasioned by embracery or not, was antiently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned[s].

20. ANOTHER offence of the same species is the *negligence of public officers*, entrusted with the administration of justice, as sheriffs, coroners, constables, and the like: which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one[t]. Also the omitting to apprehend persons, offering stolen

[o] Pott. Antiq. b. 1. c. 23.
[p] 3 Inst. 147.
[q] *Ibid.* 146.
[r] 1 Hawk. P. C. 259.
[s] See Vol. III. pag. 402, 403.
[t] 1 Hawk. P. C. 168.

iron,

iron, lead, and other metals to ſale, is a miſdemeſnor, and puniſhable by a ſtated fine, or impriſonment, in purſuance of the ſtatute 29 Geo. II. c. 30.

21. THERE is yet another offence againſt public juſtice, which is a crime of deep malignity; and ſo much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal proſecution. This is the *oppreſſion* and tyrannical partiality of judges, juſtices, and other *magiſtrates*, in the adminiſtration and under the colour of their office. However, when proſecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders) it is ſure to be ſeverely puniſhed with forfeiture of their offices, (either conſequential or immediate) fines, impriſonment, or other diſcretionary cenſure, regulated by the nature and aggravations of the offence committed.

22. LASTLY, *extortion* is an abuſe of public juſtice, which conſiſts in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due[u]. The puniſhment is fine and impriſonment, and ſometimes a forfeiture of the office.

[u] 1 Hawk. P. C. 170.

CHAPTER THE ELEVENTH.

OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to conſider offences againſt the public *peace;* the conſervation of which is intruſted to the king and his officers, in the manner and for the reaſons which were formerly mentioned at large[a]. Theſe offences are either ſuch as are an actual breach of the peace; or conſtructively ſo, by tending to make others break it. Both of theſe ſpecies are alſo either felonious, or not felonious. The felonious breaches of the peace are ſtrained up to that degree of malignity by virtue of ſeveral modern ſtatutes: and, particularly,

1. THE *riotous aſſembling* of *twelve* perſons, or more, and not diſperſing upon proclamation. This was firſt made high treaſon by ſtatute 3 & 4 Edw. VI. c. 5. when the king was a minor, and a change in religion to be effected: but that ſtatute was repealed by ſtatute 1 Mar. c. 1. among the other treaſons created ſince the 25 Edw. III; though the prohibition was in ſubſtance re-enacted, with an inferior degree of puniſhment, by ſtatute 1 Mar. ſt. 2. c. 12. which made the ſame offence a ſingle felony. Theſe ſtatutes ſpecified and particularized the nature of the riots they were meant to ſuppreſs; as, for example, ſuch as were ſet on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other ſpecific purpoſes: in which caſes, if the perſons were commanded by proclamation to diſperſe, and they did not, it was by the ſtatute of Mary made felony, but within the benefit of clergy; and alſo the act indemnified the peace officers and their aſſiſtants, if they killed any of the mob in endeavouring to ſuppreſs ſuch riot. This was thought a neceſſary ſecurity in that ſanguinary reign, when popery was intended to be re-eſtabliſhed,

a Vol. I. pag. 118. 268. 350.

which

which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And, by statute 1 Eliz. c. 16. when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the first to the death of queen Anne, it was never once thought expedient to revive it: but, in the first year of George the first, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. c. 5. enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation *ought to have been made*, and knowing of such hinderance, and not dispersing, are felons without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; being copied from the act of queen Mary. And, by a subsequent clause of the new act, if any person, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy.

2. By statute 1 Hen. VII. c. 7. *unlawful hunting* in any legal forest, park, or warren, not being the king's property, *by night*, or with *painted faces*, was declared to be single felony. But now by the statute 9 Geo. I. c. 22. to appear armed in any inclosed forest or place where deer are usually kept, or in any warren for hares or conies, or in any high

road,

road, open heath, common, or down, by day or night, with faces blacked or otherwise *disguised*, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish, or to procure by gift or promise of reward any person to join them in such unlawful act, is felony without benefit of clergy. I mention these offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed: namely, with the face blacked or with other disguise, and, being armed with offensive weapons, to the breach of the public peace and the terror of his majesty's subjects.

3. ALSO by the same statute 9 Geo. I. c. 22. amended by statute 27 Geo. II. c. 15. knowingly to send any *letter* without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. This offence was formerly high treason by the statute 8 Hen. V. c. 6.

4. To pull down or destroy any *lock*, *sluice*, or *floodgate*, erected by authority of parliament on a navigable river, is by statute 1 Geo. II. st. 2. c. 19. made felony, punishable with transportation for seven years [B]. By the statute 8 Geo. II. c. 20. the offence of destroying such works, or rescuing any person in custody for the same, is made felony without benefit of clergy; and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the statute 4 Geo. III. c. 12. maliciously to damage or destroy any banks, sluices or other works on such navigable rive, to open the floodgates, or otherwise obstruct the navigation, is again made felony, punishable with transportation for seven years. And by the statute 7 Geo. III. c. 40. (which repeals all former acts relating to turnpikes) maliciously to pull down or otherwise destroy any *turnpike-gate*, or fence, toll-house, or weighing-engine thereunto belonging, erected

[B] This statute of 1 Geo. II. st. 2. c. 19. after several continuances, was suffered to expire in 1748.

erected by authority of parliament, or to rescue any person in custody for the same, is made felony without benefit of clergy; and the indictment may be inquired of and tried in any adjacent county [c]. The remaining offences against the public peace are merely misdemesnors, and no felonies; as,

5. AFFRAYS (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the fighting be in private, it is no *affray* but an *assault* [b]. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue [c]. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace [d]. The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued [e]. Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office: or where a respect to the particular place ought to restrain and regulate men's behaviour, more than in common ones; as in the

b 1 Hawk. P. C. 134.

c *Ibid.* 136.

d *Ibid.* 137.

e *Ibid.* 138.

[c] This statute of 7 Geo. III. c. 40. is repealed by the 13 Geo. III. c. 84. and thereby the offence is made felony, and transportation for seven years, or imprisonment for any time not exceeding three years, at the discretion of the judge *(d)*.

(d) [The statute of 13 Geo. III. c. 84. except such parts thereof as have been repealed, varied, or altered, by any subsequent acts of parliament, is extended by statute 21 Geo. III. c. 20. to all acts of parliament which have been made since the time of the passing of the said act of 13 Geo. III. and which shall hereafter be made for amending and repairing any particular turnpike roads in England.]

king's court, and the like. And upon the same account also all affrays in a church or church-yard are esteemed very heinous offences, as being indignities to him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 & 6 Edw. VI. c. 4. that if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiae* (*a*); and, if a clerk in orders, from the ministration of his office during pleasure. And, if any person in such church or church-yard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. *Two* persons may be guilty of an affray: but,

6. RIOTS, *routs*, and *unlawful assemblies*, must have *three* persons at least to constitute them. An *unlawful assembly* is when three, or more, do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it [f]. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way: and make some advances towards it [g]. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel [h]: as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nusance, in a violent and tumultuous manner. The punishment of unlawful assemblies, if to the number of

f 3 Inst. 176.

g Bro. *Abr. t. Riot.* 4, 5.

h 3 Inst. 176.

(*a*) By statute 27 Geo. III. c. 44. sect. 2. no suit shall be commenced in any ecclesiastical court for striking or brawling in any church or churchyard after the expiration of eight calendar months from the time when such offence shall have been committed.

twelve, we have just now seen, may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes superadded [i]. And by the statute 13 Hen. IV. c. 7. any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable [j]. So that our antient law, previous to the modern riot act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all inclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king.

7. NEARLY related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1. c. 5. it is enacted, that not more than twenty names shall be signed to any petition to the king or either house of parliament, for any alteration or matters established by law in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assises or quarter-sessions; and, in London, by the lord mayor, aldermen, and common council [k]: and that no petition shall

i 1 Hawk. P. C. 159.

j 1 Hal. P. C. 495. 1 Hawk. P. C. 161.

k This may be one reason (among others) why the corporation of London has, since the restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

be delivered by a company of more than ten perſons: on pain in either caſe of incurring a penalty not exceeding 100 *l*, and three months impriſonment.

8. AN eighth offence againſt the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking or keeping poſſeſſion of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every perſon diſſeiſed, or turned out of poſſeſſion, unleſs his entry was taken away or barred by his own neglect, or other circumſtances; which were explained more at large in a former volume [l]. But this being found very prejudicial to the public peace, it was thought neceſſary by ſeveral ſtatutes to reſtrain all perſons from the uſe of ſuch violent methods, even of doing themſelves juſtice; and much more if they have no juſtice in their claim [m]. So that the entry now allowed by law is a peaceable one; that forbidden is ſuch as is carried on and maintained with force, with violence, and unuſual weapons. By the ſtatute 5 Ric. II. ſt. 1. c. 8. all forcible entries are puniſhed with impriſonment and ranſom at the king's will. And by the ſeveral ſtatutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more juſtices of the peace, taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to gaol, till he makes fine and ranſom to the king. And moreover the juſtice or juſtices have power to ſummon a jury, to try the forcible entry or detainer complained of: and, if the ſame be found by that jury, then, beſides the fine on the offender, the juſtices ſhall make reſtitution by the ſheriff of the poſſeſſion, without inquiring into the merits of the title; for the force is the only thing to be tried, puniſhed, and remedied by them: and the ſame may be done by indictment at the general ſeſſions. But this proviſion does not extend to ſuch as endeavour to maintain poſſeſſion by force, where they them-

l See Vol. III. pag. 174, &c.

m 1 Hawk. P. C. 141.

ſelves,

ſelves, or the anceſtors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding [n].

9. THE offence of *riding* or *going armed*, with dangerous or unuſual weapons, is a crime againſt the public peace, by terrifying the good people of the land; and is particularly prohibited by the ſtatute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and impriſonment during the king's pleaſure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour [o].

10. SPREADING *falſe news*, to make diſcord between the king and nobility, or concerning any great man of the realm, is puniſhable by common law [p] with fine and impriſonment; which is confirmed by ſtatutes Weſtm. 1. 3 Edw. I. c. 34. 2 Ric. II. ſt. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and *pretended prophecies*, with intent to diſturb the peace, are equally unlawful, and more penal; as they raiſe enthuſiaſtic jealouſies in the people, and terrify them with imaginary fears. They are therefore puniſhed by our law, upon the ſame principle that ſpreading of public news of any kind, without communicating it firſt to the magiſtrate, was prohibited by the antient Gauls [q]. Such falſe and pretended prophecies were puniſhed capitally by ſtatute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the ſtatute 5 Eliz. c. 15. the penalty for the firſt offence is a fine of ten pounds and one year's impriſonment; for the ſecond, forfeiture of all goods and chattels, and impriſonment during life.

n Holding over by force, where the tenant's title was under a leaſe, now expired, is ſaid to be a forcible detainer. (Cro. Jac. 199.)

o Pott. Antiq. b. 1. c. 26.

p 2 Inſt. 226. 3 Inſt. 198.

q "*Habent legibus ſanctum, ſi quis quid de republica a finitimis rumore aut fama acceperit, uti ad magiſtratum deferat, neve cum alio communicet: quod ſaepe homines temerarios atque imperitos falſis rumoribus terreri, et ad facinus impelli, et de ſummis rebus conſilium capere cognitum eſt.*" Caeſ. *de bell. Gall. lib.* 6. *cap.* 19.

12. Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence [r]. If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by statute 9 Ann. c. 14. shall forfeit all his goods to the crown, and suffer two years imprisonment.

13. Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt and ridicule [s]. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law [f]; and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace [t]. For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false [u]; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falshood of it may aggravate it's guilt, and enhance it's punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous [w]; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever

r 1 Hawk. P. C. 135. 138.
s *Ibid.* 193.
f Moor. 813.
t 2 Brownl. 151. 12 Rep. 35. Hob. 215. Poph. 139. 1 Hawk. P. C. 195.
u Moor. 627. 5 Rep. 125. 11 Mod. 99.
w See Vol. III. pag. 125.

offence

offence it may be againſt the public peace: and therefore, upon a civil action, the truth of the accuſation may be pleaded in bar of the ſuit. But, in a criminal proſecution, the tendency which all libels have to create animoſities, and to diſturb the public peace, is the whole that the law conſiders. And therefore, in ſuch proſecutions, the only points to be inquired into are, firſt, the making or publiſhing of the book or writing; and, ſecondly, whether the matter be criminal: and, if both theſe points are againſt the defendant, the offence againſt the public is complete. The puniſhment of ſuch libellers, for either making, repeating, printing, or publiſhing the libel, is fine, and ſuch corporal puniſhment as the court in it's diſcretion ſhall inflict; regarding the quantity of the offence, and the quality of the offender [x]. By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Auguſtus, the puniſhment became corporal only [y]. Under the emperor Valentinian [z] it was again made capital, not only to write, but to publiſh, or even to omit deſtroying them. Our law, in this and many other reſpects, correſponds rather with the middle age of Roman juriſprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were eſtabliſhed in the dark and tyrannical ages of the ancient *decemviri*, or the later emperors.

In this, and the other inſtances which we have lately conſidered, where blaſphemous, immoral, treaſonable, ſchiſmatical, ſeditious, or ſcandalous libels are puniſhed by the Engliſh law, ſome with a greater, others with a leſs degree of ſeverity; the *liberty of the preſs*, properly underſtood, is by no means infringed or violated. The liberty of the preſs is indeed eſſential to the nature of a free ſtate; but this conſiſts in laying no *previous* reſtraints upon publications, and not in freedom from cenſure for criminal matter when pub-

x 1 Hawk. P. C. 196.

y ———————*Quinetiam lex*
Poenaque lata, malo quae nollet carmine quenquam
Deſcribi: ——*vertere modum formidine* fuſtis. Hor. *ad Aug*. 152.

z *Cod*. 9. 36.

lished. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution[a], is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons

[a] The art of printing, soon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44. 134. ii. 88. 230.) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33. which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24. but though frequent attempts were made by the government to revive it, in the subsequent part of that reign, (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.) yet the parliament resisted it so strongly, that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose it's force, when it is shewn (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the controul of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press.

CHAPTER THE TWELFTH.

OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES againſt public *trade*, like thoſe of the preceding claſſes, are either felonious, or not felonious. Of the firſt ſort are,

1. OWLING, ſo called from it's being uſually carried on in the night, which is the offence of tranſporting wool or ſheep out of this kingdom, to the detriment of it's ſtaple manufacture. This was forbidden at common law [a], and more particularly by ſtatute 11 Edw. III. c. 1. when the importance of our woollen manufacture was firſt attended to; and there are now many later ſtatutes relating to this offence, the moſt uſeful and principal of which are thoſe enacted in the reign of queen Elizabeth, and ſince. The ſtatute 8 Eliz. c. 3. makes the tranſportation of live ſheep, or embarking them on board any ſhip, for the firſt offence forfeiture of goods, and impriſonment for a year, and that at the end of the year the left hand ſhall be cut off in ſome public market, and ſhall be there nailed up in the openeſt place; and the ſecond offence is felony. The ſtatutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, ſheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the intereſt of the ſhip and cargo by the owners, if privy; and confiſcation of goods, and three years impriſonment to the maſter and all the mariners. And the ſtatute 4 Geo. I. c. 11. (amended and farther enforced by 12 Geo. II. c. 21. and 19 Geo. II. c. 34.) makes it tranſportation for ſeven years, if the penalties be not paid.

2. SMUGGLING, or the offence of importing goods without paying the duties impoſed thereon by the laws of the cuſ-

[a] Mir. c. 1. §. 3.

toms and excise, is an offence generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seisure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices: but the last of them, 19 Geo. II. c. 34. is for this purpose *instar omnium*; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy: enacting, that if three or more persons shall assemble, with fire-arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seisure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall wound, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons without the benefit of clergy. As to that branch of the statute, which required any person, charged upon oath as a smuggler, under pain of death, to surrender himself upon proclamation, it seems to be expired; as the subsequent statutes [b], which continue the original act to the present time, do in terms continue only so much of the said act as relates to the *punishment* of the offenders, and not to the extraordinary method of apprehending or causing them to surrender: and for offences of this positive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot surely be too cautious in inflicting the penalty of death [c] [D].

3. Ano-

[b] Stat. 26 Geo. I. c. 32. 32 Geo. II. c. 18. 4 Geo. III. c. 12.

[c] See Vol. I. p. 317. Beccar. ch. 33.

[D] By statute 19 Geo. III. c. 69. §. 23. 'Whereas by an act made in the nineteenth year of his late majesty king Geo. II, which was to continue in force for seven years, and by several subsequent acts hath been continued until Sept. 29, 1785, and from thence to the end of the next session of parliament, persons charged with being guilty of offences in the said act mentioned were required to surrender themselves within a time limited, and that on their neglect or refusal of surrender they were to be deemed

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3. ANOTHER offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former volume;

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to be convicted and attainted of felony: and whereas doubts have arisen, whether the methods prescribed in the said act, relative to the apprehending and harbouring the offenders, or for causing them to surrender, were re-enacted and continued by the said several acts; it is enacted and declared, that all the rules, matters and things, relative to the surrender, proclaiming, apprehending, harbouring, and punishing such offenders, are continued and re-enacted by the said several acts continuing the said recited act. Which rules are to the following effect:

When any person shall be charged with any the said offences, before a justice of the peace, by information on oath, the justice shall certify the same under his hand and seal, and return the information to a secretary of state, who shall lay the same before the king in council; who may thereon make his order, commanding the offender to surrender in forty days after the first publication thereof in the gazette, to one of the judges of the king's bench or a justice of the peace, who thereon shall commit him to gaol, to answer the charge against him according to due course of law: which order the clerks of the privy council shall cause to be forthwith published in the two successive gazettes, and to be transmitted to the sheriff where the offence was committed; who shall in fourteen days cause the same to be proclaimed between ten in the morning and two in the afternoon, in the market places, on the market days, of two market towns in the same county, near the place where the offence was committed; and a copy of the order shall be affixed on some public place in the said towns: And if such offender shall not surrender pursuant to such order, or escape after surrender, he shall be attainted of felony without benefit of clergy.

And if any person, after the time appointed for surrender, shall knowingly harbour such offender; he shall, on conviction within one year, be guilty of felony, and transported for seven years.

And every person who shall take, or discover so that he may be taken, any person so advertised and not surrendering, and cause him to be brought before a judge of the king's bench, or justice of the peace for London or Middlesex (who shall commit him to Newgate), shall receive 500 *l* in one month after execu-

lume [d]; I ſhall therefore here barely mention the ſeveral ſpecies of fraud, taken notice of by the ſtatute law; *viz.* the bankrupt's neglect of ſurrendering himſelf to his creditors; his non-conformity to the directions of the ſeveral ſtatutes; his concealing or imbezzling his effects to the value of 20 *l*; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy [e]. And indeed it is allowed by ſuch as are the moſt averſe to the infliction of capital puniſhment, that the offence of fraudulent bankruptcy, being an atrocious ſpecies of the *crimen falſi*, ought to be put upon a level with thoſe of forgery and falſifying the coin [f]. And, even without actual fraud, if the bankrupt cannot

[d] See Vol. II. pag. 481, 482.

[e] Stat. 5 Geo. II. c. 30.

[f] Beccar. ch. 34.

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tion awarded, from the commiſſioners of the cuſtoms or exciſe reſpectively: and if an offender, againſt whom no ſuch order in council ſhall have been made, ſhall himſelf ſo diſcover or apprehend any other againſt whom an order hath been made; he ſhall be acquitted of all his own offences for which no proſecution is then commenced, and ſhall alſo have his ſhare of the reward: and if any perſon ſhall be maimed or grievouſly wounded in apprehending ſuch offender; he ſhall receive 50 *l*, over and above ſuch other reward as he may have as apprehender: and if any perſon ſhall be killed in apprehending, his executors or adminiſtrators ſhall receive 100 *l*.

But this ſhall not prevent miniſters of juſtice from taking ſuch offender by the ordinary courſe of law; but if he ſhall be taken before the expiration of the time limited for his ſurrender, no further proceedings ſhall be had upon the order made in council, but the offender ſhall be brought to trial by due courſe of law.

And if any offender, before order for his ſurrender, ſhall diſcover two or more accomplices, ſo as they be convicted; he ſhall receive 50 *l* for each, and be diſcharged of all offences for which no proſecution ſhall be then commenced (*e*).

(*e*) [The ſame clauſes are copied in the ſtatute 24 Geo. III. ſeſſ. 2. c. 47. relative to the ſurrender, apprehending, harbouring, and puniſhing the offenders againſt that act.]

not

not make it appear that he is disabled from paying his debts by some casual loss, he shall by the statute 21 Jac. I. c. 19. be set on the pillory for two hours, with one of his ears nailed to the same, and cut off. To this head we may also subjoin, that by statute 32 Geo. II. c. 28. it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100*l*, neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors. And these are the only felonious offences against public trade; the residue being mere misdemesnors: as,

4. USURY, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume [g]. We there observed that by statute 37 Hen. VIII. c. 9. the rate of interest was fixed at 10 *l per cent per annum*, which the statute 13 Eliz. c. 8. confirms; and ordains, that all brokers shall be guilty of a *praemunire* that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I. c. 17. reduced interest to eight *per cent*; and, it having been lowered in 1650, during the usurpation, to six *per cent*, the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13. and lastly, the statute 12 Ann. st. 2. c. 16. has reduced it to five *per cent*. Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed. Also if any scrivener or broker takes more than five shillings *per cent* procuration-money, or more than twelve-pence for making a bond, he shall forfeit 20 *l* with costs, and shall suffer imprisonment for half a year. And by statute 17 Geo. III. c. 26. to take more than ten shillings *per cent* for procuring any money to be advanced on any life-annuity, is made an indictable misdemesnor, and punishable with fine and imprisonment: as is also the offence of procuring or soliciting any infant to grant any life-annuity; or to promise, or otherwise engage, to ratify it when he comes of age.

[g] See Vol. II. pag. 455, &c.

5. CHEATING is another offence, more immediately against public trade: as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assise* of bread, or the rules laid down by law, and particularly by statutes 31 Geo. II. c. 29. 3 Geo. III. c. 11. and 13 Geo. III. c. 62. for ascertaining it's price in every given quantity, is reducible to this head of cheating: as is likewise in a peculiar manner the offence of selling by *false weights and measures*; the standard of which fell under our consideration in a former volume [h]. The punishment of bakers, breaking the assise, was antiently to stand in the pillory, by statute 51 Hen. III. st. 6. and for brewers (by the same act) to stand in the tumbrel or dungcart [i]: which, as we learn from domesday book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the confessor. "*Malam cerevisiam faciens, in cathedra ponebatur stercoris* [j]." But now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade, or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory [k]. And by the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct.

h See Vol. I. pag. 274.

i 3 Inst. 219.

j Seld. tit. of hon. b. 2. c. 5. §. 3.

k 1 Hawk. P. C. 188.

6. THE

6. THE offence of *foreſtalling* the market is alſo an offence againſt public trade. This, which (as well as the two following) is alſo an offence at common law [l], was deſcribed by ſtatute 5 & 6 Edw. VI. c. 14. to be the buying or contracting for any merchandize or victual coming in the way to market; or diſſuading perſons from bringing their goods or proviſions there; or perſuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. REGRATING was deſcribed by the ſame ſtatute to be the buying of corn, or other dead victual, in any market, and ſelling it again in the ſame market, or within four miles of the place. For this alſo enhances the price of the proviſions, as every ſucceſſive ſeller muſt have a ſucceſſive profit.

8. ENGROSSING was alſo deſcribed to be the getting into one's poſſeſſion, or buying up, large quantities of corn or other dead victuals, with intent to ſell them again. This muſt of courſe be injurious to the public, by putting it in the power of one or two rich men to raiſe the price of proviſions at their own diſcretion. And ſo the total engroſſing of any other commodity, with intent to ſell it at an unreaſonable price, is an offence indictable and finable at the common law [m]. And the general penalty for theſe three offences by the common law (for all the ſtatutes concerning them were repealed by 12 Geo. III. c. 71.) is, as in other minute miſdemeſnors, diſcretionary fine and impriſonment [n]. Among the Romans theſe offences and other mal-practices to raiſe the price of proviſions, were puniſhed by a pecuniary mulct. "*Poena viginti aureorum ſtatuitur adverſus eum, qui contra annonam fecerit, ſocietatemve coierit quo annona carior fiat* [o]."

9. MONOPOLIES are much the ſame offence in other branches of trade, that engroſſing is in proviſions: being a licence or privilege allowed by the king for the ſole buying and ſelling, making, working, or uſing of any thing whatſoever;

l 1 Hawk. P. C. 234.
m Cro. Car. 232.
n 1 Hawk P. C. 235.
o *Ff.* 48. 12. 2.

ſoever; whereby the ſubject in general is reſtrained from that liberty of manufacturing or trading which he had before[p]. Theſe had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by ſir Edward Coke[q], in the beginning of the reign of king James the firſt: but were in great meaſure remedied by ſtatute 21 Jac. I. c. 3. which declares ſuch monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions; and except alſo patents concerning printing, ſaltpetre, gunpowder, great ordnance, and ſhot) and monopoliſts are puniſhed with the forfeiture of treble damages and double coſts, to thoſe whom they attempt to diſturb; and if they procure any action, brought againſt them for theſe damages, to be ſtayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of *praemunire*. Combinations alſo among victuallers or artificers, to raiſe the price of proviſions, or any commodities, or the rate of labour, are in many caſes ſeverely puniſhed by particular ſtatutes; and, in general, by ſtatute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10*l*, or twenty days impriſonment, with an allowance of only bread and water, for the firſt offence; 20*l*, or the pillory, for the ſecond; and 40*l* for the third, or elſe the pillory, loſs of one ear, and perpetual infamy. In the ſame manner, by a conſtitution of the emperor Zeno[r], all monopolies and combinations to keep up the price of merchandize, proviſions, or workmanſhip, were prohibited, upon pain of forfeiture of goods and perpetual baniſhment.

10. To exerciſe a *trade* in any town, without having previouſly ſerved as an *apprentice* for ſeven years[s], is looked upon to be detrimental to public trade, upon the ſuppoſed want of ſufficient ſkill in the trader; and therefore is puniſhed by ſtatute 5 Eliz. c. 4. with the forfeiture of forty ſhillings by the month.

[p] 1 Hawk. P. C. 231.
[q] 3 Inſt. 181.
[r] *Cod.* 4. 59. 1.
[s] See Vol. I. pag. 427.

11. LASTLY, to prevent the deſtruction of our home manufactures, by *tranſporting and ſeducing our artiſts* to ſettle abroad, it is provided by ſtatute 5 Geo. I. c. 27. that ſuch as ſo entice or ſeduce them ſhall be fined 100*l*, and be imprisoned three months; and for the ſecond offence ſhall be fined at diſcretion, and be impriſoned a year: and the artificers, ſo going into foreign countries, and not returning within ſix months after warning given them by the Britiſh embaſſador where they reſide, ſhall be deemed aliens, and forfeit all their lands and goods, and ſhall be incapable of any legacy or gift. By ſtatute 23 Geo. II. c. 13. the seducers incur, for the firſt offence, a forfeiture of 500*l* for each artificer contracted with to be ſent abroad, and impriſonment for twelve months; and for the ſecond, 1000*l*, and are liable to two years impriſonment: and by the ſame ſtatute, connected with 14 Geo. III. c. 71. if any perſon exports any tools or utenſils uſed in the ſilk, linen, cotton, or woollen manufactures, (excepting woolcards to North America[t]) he forfeits the ſame and 200*l*, and the captain of the ſhip (having knowlege thereof) 100*l*: and if any captain of a king's ſhip, or officer of the cuſtoms, knowingly ſuffers ſuch exportation, he forfeits 100 *l*, and his employment; and is for ever made incapable of bearing any public office: and every perſon collecting ſuch tools or utenſils, in order to export the ſame, ſhall on conviction at the aſſiſes forfeit ſuch tools and alſo 200 *l*. [E]

[t] Stat. 15 Geo. III. c. 5.

[E] By ſtatute 21 Geo. III. c. 37. The ſaid penalties on the captain of the ſhip and officer of the cuſtoms are augmented to 200*l*: and if any perſon ſhall have in his cuſtody, or apply for or procure to be made any ſuch tool or utenſil; he ſhall forfeit the ſame, and 200*l*, and be impriſoned for twelve months and till the forfeiture ſhall be paid.

And by 22 Geo. III. c. 60. If any perſon ſhall contract with, or endeavour to perſuade, any artificer concerned in printing callicoes, cottons, muſlins, or linens of any ſort, or in preparing any tools or utenſils for ſuch manufactory, to go out of the kingdom; he

he ſhall forfeit 500 *l*, and be impriſoned for twelve months; for a ſecond offence 1000 *l*, and be impriſoned for two years. And if any perſon ſhall export or attempt to export any ſuch tools or utenſils, he ſhall forfeit the ſame and alſo 500 *l*: and any officer of the ſhip conniving thereat, ſhall forfeit 500 *l*; and if it is a king's ſhip, he ſhall alſo forfeit his office and be incapaciated (*f*).

(*f*) [And by 25 Geo. III. c. 67. ſ. 6. If any perſon ſhall contract with, entice, perſuade, or endeavour to ſeduce or encourage any artificer or workman concerned or employed, or who ſhall have worked at, or been employed in the iron or ſteel manufactures in this kingdom, or in making or preparing any tools or utenſils for ſuch manufactory, to go out of Great-Britain, to any parts beyond the ſeas (except to Ireland), and ſhall be convicted thereof, upon indictment or information, in the court of king's bench at Weſtminſter, or by indictment at the aſſizes, or general gaol-delivery, or quarter-ſeſſions for the county or place wherein ſuch offence ſhall be committed, or the offender ſhall live or reſide, or by indictment in the court of juſticiary, or any of the circuit courts in Scotland, as the caſe may be; every perſon ſo convicted ſhall for every artificer ſo contracted with, enticed, perſuaded, encouraged or ſeduced, or attempted ſo to be, forfeit and pay the ſum of 500 *l*, and ſhall be committed to the common gaol for the county, place, or ſtewartry wherein the offender ſhall be convicted, there to remain without bail or mainprize, for the ſpace of twelve calendar months, and until ſuch forfeiture ſhall be paid; and 1000 *l* and two years impriſonment for a ſubſequent offence.

And by the ſame act of parliament (ſect. 1.) if any perſon, on any pretence whatſoever, ſhall export, load, put on board or pack, or cauſe or procure to be loaden, &c. any ſhip, which ſhall be bound to ſome place beyond the ſeas (except to Ireland), or ſhall bring to any quay, wharf, or other place, in order to be laden or put on board any ſuch ſhip, any tool, &c. in the act ſpecified, he ſhall not only forfeit ſuch tools; and on complaint upon the oath of one or more credible witneſs or witneſſes before any juſtice of the peace, it ſhall be lawful for ſuch juſtice to iſſue his warrant to bring the perſon ſo complained of before him, or ſome other juſtice; and if the offender ſhall not give a ſatisfactory account before the juſtice, he ſhall be bound, with reaſonable ſureties, to appear at the next aſſizes, or the quarter-ſeſſions;

 and

and in case such person shall refuse or neglect to give such security, then such justice may commit him for trial; and in case any such person shall be convicted upon any indictment or information against him, he shall for every such offence forfeit the sum of 200*l*, and be imprisoned for the space of twelve months, without bail or mainprize, and until such forfeiture shall be paid. And by sect. 3. if any captain of a ship shall knowingly permit any tool, &c. by this act prohibited to be exported as aforesaid, to be put on board his ship, he shall for every such offence forfeit the sum of 200 *l*; and if the said ship shall belong to his majesty, then the captain shall not only forfeit the sum of 200 *l*, but shall also forfeit his employment, and be incapable of holding any office or employment under his majesty, his heirs or successors. But now by statute 26 Geo. III. c. 89. it is lawful to export any tools or utensils made use of in the iron or steel manufactures of this kingdom, which might have been legally exported before the passing of the act of 25 Geo. III. above-mentioned, except several articles in the said act of 26 Geo. III. specified.

CHAPTER THE THIRTEENTH.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR OECONOMY.

THE fourth ſpecies of offences, more eſpecially affecting the commonwealth, are ſuch as are againſt the public *health* of the nation; a concern of the higheſt importance, and for the preſervation of which there are in many countries ſpecial magiſtrates or curators appointed.

1. THE firſt of theſe offences is a felony; but, by the bleſſing of providence for more than a century paſt, incapable of being committed in this nation. For by ſtatute 1 Jac. I. c. 31. it is enacted, that if any perſon infected with the plague, or dwelling in any infected houſe, be commanded by the mayor or conſtable, or other head officer of his town or vill, to keep his houſe, and ſhall venture to diſobey it; he may be inforced, by the watchmen appointed on ſuch melancholy occaſions, to obey ſuch neceſſary command: and, if any hurt enſue by ſuch inforcement, the watchmen are thereby indemnified. And farther, if ſuch perſon ſo commanded to confine himſelf goes abroad, and converſes in company, if he has no plague ſore upon him, he ſhall be puniſhed as a vagabond by whipping, and be bound to his good behaviour: but, if he has any infectious ſore upon him, uncured, he then ſhall be guilty of felony. By the ſtatute 26 Geo. II. c.6. (explained and amended by 29 Geo. II. c. 8. (a)) the method of performing *quarantine*, or forty days probation, by ſhips coming from infected countries, is put in a much more regular and effectual order than formerly, and maſters of ſhips coming from infected places and diſobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The ſame

(*a*) And further enforced and regulated by 28 Geo. III. c. 34.

penalty alſo attends perſons eſcaping from the *lazarets*, or places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and perſons conveying goods or letters from ſhips performing quarantine.

2. A SECOND, but much inferior ſpecies, of offence againſt public health is the ſelling of *unwholeſome proviſions*. To prevent which the ſtatute 51 Hen. III. ſt. 6. and the ordinance for bakers, c. 7. prohibit the ſale of corrupted wine, contagious or unwholeſome fleſh, or fleſh that is bought of a Jew; under pain of amercement for the firſt offence, pillory for the ſecond, fine and impriſonment for the third, and abjuration of the town for the fourth. And by the ſtatute 12 Car. II. c. 25. §. 11. any brewing or adulteration of wine is puniſhed with the forfeiture of 100*l*, if done by the wholeſale merchant; and 40*l* if done by the vintner or retail trader. Theſe are all the offences which may properly be ſaid to reſpect the public health.

V. THE laſt ſpecies of offences which eſpecially affect the commonwealth are thoſe againſt the public *police* and *oeconomy*. By the public police and oeconomy I mean the due regulation and domeſtic order of the kingdom: whereby the individuals of the ſtate, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, induſtrious, and inoffenſive in their reſpective ſtations. This head of offences muſt therefore be very miſcellaneous, as it comprizes all ſuch crimes as eſpecially affect public ſociety, and are not comprehended under any of the four preceding ſpecies. Theſe amount, ſome of them to felony, and others to miſdemeſnors only. Among the former are,

1. THE offence of *clandeſtine marriages*; for by the ſtatute 26 Geo. II. c. 33. 1. To ſolemnize marriage in any other place beſides a church, or public chapel wherein banns have been uſually publiſhed, except by licence from the archbiſhop of Canterbury;—and, 2. To ſolemnize marriage in ſuch church or chapel without due publication of banns, or

licence

licence obtained from a proper authority;—do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation, for fourteen years: as, by three former statutes[a], he and his assistants were subject to a pecuniary forfeiture of 100*l*. 3. To make a false entry in a marriage register; to alter it when made; to forge, or counterfeit, such entry, or a marriage licence; to cause or procure, or act or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage, or subject any person to the penalties of this act; all these offences, knowingly and wilfully committed, subject the party to the guilt of felony without benefit of clergy.

2. ANOTHER felonious offence, with regard to this holy estate of matrimony, is what some have corruptly called *bigamy*, which properly signifies being twice married; but is more justly denominated *polygamy*, or having a plurality of wives at once[b]. Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it felony, by reason of it's being so great a violation of the public oeconomy and decency of a well-ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but

a 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19. §. 176.

b 3 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, *A. D.* 1274, held under pope Gregory X, were *omni privilegio clericali nudati et coercioni fori secularis addicti*. (6 *Decretal. l.* 12.) This canon was adopted and explained in England, by statute 4 Edw. I. st. 3. c. 5. and *bigamy* thereupon became no uncommon counterplea, to the claim of the benefit of clergy. (*M.* 40 *Edw. III.* 42. *M.* 11 *Hen. IV.* 11. 48. M. 13 *Hen. IV.* 6. Staunf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by statute 18 Edw. III. st. 3. c. 2. to belong to the court christian, like that of *bastardy*. But by stat. 1 Edw. VI. c. 12. §. 16. *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dyer 201.

in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German anceſtors, who, as Tacitus informs us [c], "*prope ſoli barbarorum ſingulis uxoribus contenti ſunt.*" It is therefore puniſhed by the laws both of antient and modern Sweden with death [d]. And with us in England it is enacted by ſtatute 1 Jac. I. c. 11. that if any perſon, being married, do afterwards marry again, the former huſband or wife being alive, it is felony; but within the benefit of clergy. The firſt wife in this caſe ſhall not be admitted as a witneſs againſt her huſband, becauſe ſhe is the true wife; but the ſecond may, for ſhe is indeed no wife at all [e]: and ſo, *vice verſa*, of a ſecond huſband. This act makes an exception to five caſes, in which ſuch ſecond marriage, though in the three firſt it is void, is yet no felony [f]. 1. Where either party hath been continually *abroad* for ſeven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been abſent from the other ſeven years *within* this kingdom, and the remaining party hath had no knowlege of the other's being alive within that time. 3. Where there is a divorce (or ſeparation *a menſa et thoro*) by ſentence in the eccleſiaſtical court. 4. Where the firſt marriage is declared abſolutely void by any ſuch ſentence, and the parties looſed *a vinculo*. Or, 5. Where either of the parties was under the age of conſent at the time of the firſt marriage, for in ſuch caſe the firſt marriage was voidable by the diſagreement of either party, which the ſecond marriage very clearly amounts to. But if at the age of conſent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them ſhould marry again; I ſhould apprehend that ſuch ſecond marriage would be within the reaſon and penalties of the act.

3. A THIRD ſpecies of felony againſt the good order and oeconomy of the kingdom, is by idle *ſoldiers* and *mariners*

c *de mor. Germ.* 18.
d Stiernh. *de jure Sueon. l.* 3. *c.* 2.
e 1 Hal. P.C. 693.
f 3 Inſt. 89. Kel. 27. 1 Hal. P.C. 694.

wandering about the realm, or perſons pretending ſo to be, and abuſing the name of that honourable profeſſion[g]. Such a one not having a teſtimonial or paſs from a juſtice of the peace, limiting the time of his paſſage; or exceeding the time limited for fourteen days, unleſs he falls ſick; or forging ſuch teſtimonial; is by ſtatute 39 Eliz. c. 17. made guilty of felony without benefit of clergy. This ſanguinary law, though in practice deſervedly antiquated, ſtill remains a diſgrace to our ſtatute-book: yet attended with this mitigation, that the offender may be delivered, if any honeſt freeholder or other perſon of ſubſtance will take him into his ſervice, and he abides in the ſame for one year; unleſs licenced to depart by his employer, who in ſuch caſe ſhall forfeit ten pounds.

4. OUTLANDISH perſons calling themſelves *Egyptians*, or *gypſies*, are another object of the ſeverity of ſome of our unrepealed ſtatutes. Theſe are a ſtrange kind of commonwealth among themſelves of wandering impoſters and jugglers, who were firſt taken notice of in Germany about the beginning of the fifteenth century, and have ſince ſpread themſelves all over Europe. Munſter[h], who is followed and relied upon by Spelman[i] and other writers, fixes the time of their firſt appearance to the year 1417; under paſſports, real or pretended, from the emperor Sigiſmund, king of Hungary. And pope Pius II. (who died *A. D.* 1464) mentions them in his hiſtory as thieves and vagabonds, then wandering with their families over Europe, under the name of Zigari; and whom he ſuppoſes to have migrated from the country of the Zigi, which nearly anſwers to the modern Circaſſia. In the compaſs of a few years they gained ſuch a number of idle proſelytes, (who imitated their language and complexion, and betook themſelves to the ſame arts of chiromancy, begging, and pilfering) that they became troubleſome and even formidable to moſt of the ſtates of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591[k]. And the government in England took the alarm much earlier: for in 1530, they are deſcribed by ſtatute 22 Hen. VIII. c. 10. as

g 3 Inſt. 85.
h *Coſmogr. l.* 3.
i *Gloſſ.* 193.
k Dufreſne. *Gloſſ. I.* 200.

"outlandiſh

"outlandish people, calling themselves Egyptians, using no "craft nor feat of merchandize, who have come into this "realm and gone from shire to shire and place to place in "great company, and used great, subtil, and crafty means "to deceive the people; bearing them in hand, that they "by palmestry could tell men's and women's fortunes; and "so many times by craft and subtilty have deceived the peo- "ple of their money, and also have committed many heinous "felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels: and, upon their trials for any felony which they may have committed, they shall not be entitled to a jury *de medietate linguae*. And afterwards, it is enacted by statute 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. *(g)* that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. And if the Egyptians themselves remain one month in this kingdom; or if any person, being fourteen years old, (whether natural born subject or stranger) which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times; it is felony without benefit of clergy: and sir Matthew Hale informs us[l], that at one Suffolk assises no less than thirteen gypsies were executed upon these statutes a few years before the restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into practice.

5. To descend next to offences, whose punishment is short of death. *Common nusances* are a species of offences against the public order and oeconomical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires[m]. The nature of *common* nusances, and their distinction from *private* nusances, were explained in the pre-

[l] 1 Hal. P. C. 671.

[m] 1 Hawk. P. C. 197.

(g) [This act is repealed by statute 23 Geo. III. c. 51. *vid.* ante page 4.]

ceding volume [n]; when we conſidered more particularly the nature of the private ſort, as a civil injury to individuals. I ſhall here only remind the ſtudent, that common nuſances are ſuch inconvenient or troubleſome offences, as annoy the whole community in general, and not merely ſome particular perſon; and therefore are indictable only, and not actionable; as it would be unreaſonable to multiply ſuits, by giving every man a ſeparate right of action, for what damnifies him in common only with the reſt of his fellow-ſubjects. Of this nature are, 1. Annoyances in *highways*, *bridges*, and public *rivers*, by rendering the ſame inconvenient or dangerous to paſs: either poſitively, by actual obſtructions; or negatively, by want of reparations. For both of theſe, the perſon ſo obſtructing, or ſuch individuals as are bound to repair and cleanſe them, or (in default of theſe laſt) the pariſh at large, may be indicted, diſtreined to repair and amend them, and in ſome caſes fined. And a preſentment thereof by a judge of aſſiſe, &c. or a juſtice of the peace, ſhall be in all reſpects equivalent to an indictment [o]. Where there is an houſe erected, or an incloſure made, upon any part of the king's demeſnes, or of an highway, or common ſtreet, or public water, or ſuch like public things, it is properly called a *purpreſture* [p]. 2. All thoſe kinds of nuſances, (ſuch as offenſive trades and manufactures) which when injurious to a private man are actionable, are, when detrimental to the public, puniſhable by public proſecution, and ſubject to fine according to the quantity of the miſdemeſnor: and particularly the keeping of hogs in any city or market town is indictable as a public nuſance [q]. 3. All diſorderly *inns* or *ale-houſes*, *bawdy-houſes*, *gaming-houſes*, *ſtage-plays* unlicenced, booths and ſtages for *rope-dancers*, *mountebanks*, and the like, are public nuſances, and may upon indictment be ſuppreſſed and fined [r]. Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, ſuppreſſed, and the inn-keepers fined, if they refuſe to entertain a traveller without a very

[n] Vol. III. pag. 216.

[o] Stat. 7 Geo. III. c. 42.

[p] Co. Litt. 277. from the French *pourpris*, an incloſure.

[q] Salk. 460.

[r] 1 Hawk. P. C. 198. 225.

ſufficient

ſufficient cauſe: for thus to fruſtrate the end of their inſtitution is held to be diſorderly behaviour [f]. Thus too the hoſpitable laws of Norway puniſh, in the ſevereſt degree, ſuch inn-keepers as refuſe to furniſh accommodations at a juſt and reaſonable price [s]. 4. By ſtatute 10 & 11 W. III. c. 17. all *lotteries* are declared to be public nuſances, and all grants, patents, or licences for the ſame to be contrary to law. But, as ſtate-lotteries have, for many years paſt, been found a ready mode for raiſing the ſupply, an act was made 19 Geo. III. c. 21. to licence and regulate the keepers of ſuch lottery-offices. 5. The making and ſelling of *fire-works* and *ſquibs*, or throwing them about in any ſtreet, is, on account of the danger that may enſue to any thatched or timber buildings, declared to be a common nuſance, by ſtatute 9 & 10 W. III. c. 7. and therefore is puniſhable by fine. And to this head we may refer (though not declared a common nuſance) the making, keeping, or carriage, of too large a quantity of *gunpowder* at one time, or in one place or vehicle; which is prohibited by ſtatute 12 Geo. III. c. 61. under heavy penalties and forfeiture. 6. *Eaves-droppers*, or ſuch as liſten under walls or windows or the eaves of a houſe, to hearken after diſcourſe, and thereupon to frame ſlanderous and miſchievous tales, are a common nuſance and preſentable at the court-leet [t]: or are indictable at the ſeſſions, and puniſhable by fine and finding ſureties for their good behaviour [u]. 7. Laſtly, a *common ſcold*, *communis rixatrix*, (for our law-latin confines it to the feminine gender) is a public nuſance to her neighbourhood. For which offence ſhe may be indicted [v]; and, if convicted, ſhall [w] be ſentenced to be placed in a certain engine of correction called the trebucket, caſtigatory, or *cucking* ſtool, which in the Saxon language is ſaid to ſignify the ſcolding ſtool; though now it is frequently corrupted into *ducking* ſtool, becauſe the reſidue of the judgment is, that, when ſhe is ſo placed therein, ſhe ſhall be plunged in the water for her puniſhment [x].

[f] 1 Hawk. P. C. 225.

[s] Stiernh. *de jure Sueon. l.* 2. *c.* 9.

[t] Kitch. of courts. 20.

[u] *Ibid.* 1 Hawk. P. C. 132.

[v] 6 Mod. 213.

[w] 1 Hawk. P. C. 198. 200.

[x] 3 Inſt. 219.

6. IDLENESS

6. IDLENESS in any perſon whatſoever is alſo a high offence againſt the public oeconomy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, ſomebody muſt ſuffer cold or hunger: the produce of the lands not being more than ſufficient, with culture, to maintain the inhabitants: and therefore, though the idle perſon may ſhift off the want from himſelf, yet it muſt in the end fall ſomewhere. The court alſo of Areopagus at Athens puniſhed idleneſs, and exerted a right of examining every citizen in what manner he ſpent his time; the intention of which was [y], that the Athenians, knowing they were to give an account of their occupations, ſhould follow only ſuch as were laudable, and that there might be no room left for ſuch as lived by unlawful arts. The civil law expelled all ſturdy vagrants from the city [z]: and, in our own law, all idle perſons or vagabonds, whom our antient ſtatutes deſcribe to be "ſuch as wake on the night, and ſleep on the "day, and haunt cuſtomable taverns, and ale-houſes, and "routs about; and no man wot from whence they come, ne "whether they go;" or ſuch as are more particularly deſcribed by ſtatute 17 Geo. II. c. 5. and divided into three claſſes, *idle* and *diſorderly* perſons, *rogues* and *vagabonds*, and *incorrigible rogues*;—all theſe are offenders againſt the good order, and blemiſhes in the government, of any kingdom. They are therefore all puniſhed, by the ſtatute laſt mentioned; that is to ſay, idle and diſorderly perſons with one month's impriſonment in the houſe of correction; rogues and vagabonds with whipping and impriſonment not exceeding ſix months; and incorrigible rogues with the like diſcipline and confinement, not exceeding two years: the breach and eſcape from which confinement in one of an inferior claſs, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon, and liable to be tranſported for ſeven years. Perſons harbouring vagrants are liable to a fine of forty ſhillings, and to pay all expenſes brought upon the pariſh thereby: in the ſame manner as, by our antient

y Valer. Maxim. *l.* 2. *c.* 6.

z *Nov.* 80. *c.* 5.

laws,

laws, whoever harboured any ſtranger for more than two nights, was anſwerable to the public for any offence that ſuch his inmate might commit[a] (*h*).

7. UNDER the head of public oeconomy may alſo be properly ranked all ſumptuary laws againſt *luxury*, and extravagant expenſes in dreſs, diet, and the like; concerning the general utility of which to a ſtate, there is much controverſy among the political writers. Baron Monteſquieu lays it down[b], that luxury is neceſſary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whoſe government is compounded of both ſpecies, it may ſtill be a dubious queſtion how far private luxury is a public evil; and as ſuch cognizable by public laws. And indeed our legiſlators have ſeveral times changed their ſentiments as to this point; for formerly there were a

a *LL. Edw. c.* 27. *Bracton. l.* 3. *tr.* 2. c. 10. §. 2.

b Sp. L. b. 7. c. 2 & 4.

(*h*) [By the ſtatute 23 Geo. III. c. 88. reciting, Whereas divers ill-diſpoſed perſons are frequently apprehended, having upon them implements for houſe-breaking, or offenſive weapons, or are found in or upon houſes, warehouſes, ſtables, or outhouſes, areas of houſes, coach-houſes, incloſed yards or gardens belonging to houſes, with intent to commit felonies; and although their evil purpoſes are thereby manifeſted, the power of his majeſty's juſtices of the peace to demand of them ſureties for their good behaviour hath not been of ſufficient effect to prevent them from carrying their evil purpoſes into execution; it is enacted, that if any perſon ſhall be apprehended, having upon him or her any picklock-key, crow, jack, bit, or other implement, with an intent feloniouſly to break and enter into any dwelling-houſe, warehouſe, coach-houſe, ſtable, or out-houſe; or ſhall have upon him any piſtol, hanger, cutlaſs, bludgeon, or other offenſive weapon, with intent feloniouſly to aſſault any perſon, or ſhall be found in or upon any dwelling-houſe, warehouſe, coach-houſe, ſtable, or out-houſe, or in any incloſed yard or garden or area belonging to any houſe, with an intent to ſteal any goods or chattels, every ſuch perſon ſhall be deemed a rogue and vagabond, within the intent and meaning of the ſtatute made in the ſeventeenth year of his late majeſty king George the IId.]

multitude

multitude of penal laws existing, to restrain excess in apparel[c]; chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I. c. 25. But, as to excess in diet, there still remains one antient statute unrepealed, 10 Edw. III. st. 3. which ordains that no man shall be served, at dinner or supper, with more than two courses; except upon some great holidays there specified, in which he may be served with three.

8. NEXT to that of luxury, naturally follows the offence of *gaming*, which is generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class; and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of antient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder. To restrain this pernicious vice, among the inferior sort of people, the statute 33 Hen. VIII. c. 9. was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified[d], unless in the time of christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. II. c. 24. inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game, as upon the servants themselves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacri-

c 3 Inst. 199.

d Logetting in the fields, slide-thrift or shove-groat, cloyish-cayles, half-bowl, and coyting.

fice,

fice, and which we ſeem to have inherited from our anceſtors the antient Germans; whom Tacitus[e] deſcribes to have been bewitched with the ſpirit of play to a moſt exorbitant degree. "They addict themſelves, ſays he, to dice (which is won-"derful) when ſober, and as a ſerious employment; with "ſuch a mad deſire of winning or loſing, that, when ſtript "of every thing elſe, they will ſtake at laſt their liberty "and their very ſelves. The loſer goes into a voluntary ſla-"very, and, though younger and ſtronger than his antago-"niſt, ſuffers himſelf to be bound and ſold. And this per-"ſeverance in ſo bad a cauſe they call the point of honour: "*ea eſt in re prava pervicacia, ipſi fidem vocant.*" One would almoſt be tempted to think Tacitus was deſcribing a modern Engliſhman. When men are thus intoxicated with ſo frantic a ſpirit, laws will be of little avail: becauſe the ſame falſe ſenſe of honour, that prompts a man to ſacrifice himſelf, will deter him from appealing to the magiſtrate. Yet it is proper that laws ſhould be, and be known publicly, that gentlemen may conſider what penalties they wilfully incur, and what a confidence they repoſe in ſharpers; who, if ſucceſsful in play, are certain to be paid with honour, or, if unſucceſsful, have it in their power to be ſtill greater gainers by informing. For by ſtatute 16 Car. II. c. 7. if any perſon by playing or betting ſhall loſe more than 100 *l* at one time, he ſhall not be compellable to pay the ſame; and the winner ſhall forfeit treble the value, one moiety to the king, the other to the informer. The ſtatute 9 Ann. c. 14. enacts, that all bonds and other ſecurities, given for money won at play, or money lent at the time to play withal, ſhall be utterly void; that all mortgages and incumbrances of lands, made upon the ſame conſideration, ſhall be and enure to the uſe of the heir of the mortgagor: that, if any perſon at any time or ſitting loſe 10 *l* at play, he may ſue the winner, and recover it back by action of debt at law; and, in caſe the loſer does not, any other perſon may ſue the winner for treble the ſum ſo loſt; and the plaintiff may by bill in equity examine the defendant himſelf upon oath: and that in any of theſe ſuits no privilege of par-

[e] *de mor. Germ. c.* 24.

liament shall be allowed. The statute farther enacts, that if any person by cheating at play shall win any money or valuable thing, or shall at any one time or sitting win more than 10 *l*, he may be indicted thereupon, and shall forfeit five times the value to any person who will sue for it; and (in case of cheating) shall be deemed infamous, and suffer such corporal punishment as in case of wilful perjury. By several statutes of the reign of king George II.[f], all private lotteries by tickets, cards, or dice, (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly polly, and all other games with dice, except back-gammon) are prohibited under a penalty of 200 *l* for him that shall erect such lotteries, and 50 *l* a time for the players. Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes[g] under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II. c. 19. to prevent the multiplicity of horse races, another fund of gaming, directs that no plates or matches under 50 *l* value shall be run, upon penalty of 200 *l*, to be paid by the owner of each horse running, and 100 *l* by such as advertise the plate. By statute 18 Geo. II. c. 34. the statute 9 Ann. is farther enforced, and some deficiencies supplied: the forfeitures of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or losing at play or by betting at any one time 10 *l*, or 20 *l* within twenty-four hours, he shall be fined five times the sum for the benefit of the poor of the parish. Thus careful has the legislature been to prevent this destructive vice: which may show that our laws against gaming are not

[f] 12 Geo. II. c. 28. 13 Geo. II. c. 19. 18 Geo. II. c. 34.

[g] 10 & 11 W. III. c. 17. 9 Ann. c. 6. §. 56. 10 Ann. c. 26. §. 109. 8 Geo. I. c. 2. §. 36, 37. 9 Geo. I. c. 19. §. 4, 5. 6 Geo. II. c. 35. §. 29, 30.

ſo deficient, as ourſelves and our magiſtrates in putting thoſe laws in execution.

9. LASTLY, there is another offence, conſtituted by a variety of acts of parliament; which are ſo numerous and ſo confuſed, and the crime itſelf of ſo queſtionable a nature, that I ſhall not detain the reader with many obſervations thereupon. And yet it is an offence which the ſportſmen of England ſeem to think of the higheſt importance; and a matter, perhaps the only one, of general and national concern: aſſociations having been formed all over the kingdom to prevent it's deſtructive progreſs. I mean the offence of deſtroying ſuch beaſts and fowls, as are ranked under the denomination of *game:* which, we may remember, was formerly obſerved [h], (upon the old principles of the foreſt law) to be a treſpaſs and offence in all perſons alike, who have not authority from the crown to kill game (which is royal property) by the grant of either a free warren, or at leaſt a manor of their own. But the laws, called the game laws, have alſo inflicted additional puniſhments (chiefly pecuniary) on perſons guilty of this general offence, unleſs they be people of ſuch rank or fortune as is therein particularly ſpecified. All perſons therefore, of what property or diſtinction ſoever, that kill game out of their own territories, or even upon their own eſtates, without the king's licence expreſſed by the grant of a franchiſe, are guilty of the firſt original offence, of encroaching on the royal prerogative. And thoſe indigent perſons who do ſo, without having ſuch rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations alſo, created by the ſtatutes for preſerving the game: which aggravations are ſo ſeverely puniſhed, and thoſe puniſhments ſo implacably inflicted, that the offence againſt the king is ſeldom thought of, provided the miſerable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the preſent head, becauſe the only rational footing, upon which we can conſider it as a crime, is, that in low and indigent perſons it promotes idleneſs, and takes them away from their proper employments and callings:

h See Vol. II. pag. 417, &c.

that may arise from the fact: and except also, that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority[g].

V. THE trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter[h]: "*nullus liber homo capiatur, vel imprisonetur, aut* "*exulet, aut aliquo alio modo destruatur, nisi per legale judicium* "*parium suorum, vel per legem terrae.*"

THE antiquity and excellence of this trial, for the settling of civil property, has before been explained at large[i]. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury: and that the truth of every accusation, whether pre-

g Kelynge. 56. Stat. 7 W. III. c. 3. §. 11. Foster. 247.

h 9 Hen. III. c. 29.

i See Vol. III. pag. 379.

ferred in t shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

WHAT was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits; indictments, informations, and appeals; which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is freeholders, without just exception, and of the *visne* or neighbourhood: which is interpreted to be of the county where the fact is committed j. If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impa-

j 2 Hal. P. C. 264. 2 Hawk. P. C. 403.

nelled by writ of *venire facias* to the ſheriff, as in civil cauſes: and the trial in caſe of a miſdemeſnor is had at *niſi prius*, unleſs it be of ſuch conſequence as to merit a trial at bar; which is always invariably had when the priſoner is tried for any capital offence. But, before commiſſioners of *oyer* and *terminer* and gaol delivery, the ſheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that ſeſſion: and therefore it is there uſual to try all felons immediately, or ſoon, after their arraignment. But it is not cuſtomary, nor agreeable to the general courſe of proceedings, (unleſs by conſent of parties, or where the defendant is actually in gaol) to try perſons indicted of ſmaller miſdemeſnors at the ſame court in which they have pleaded *not guilty*, or *traverſed* the indictment. But they uſually give ſecurity to the court, to appear at the next aſſiſes or ſeſſion, and then and there to try the traverſe, giving notice to the proſecutor of the ſame.

IN caſes of high treaſon, whereby corruption of blood may enſue, (except treaſon in counterfeiting the king's coin or ſeals) or miſpriſion of ſuch treaſon, it is enacted by ſtatute 7 W. III. c. 3. firſt, that no perſon ſhall be tried for any ſuch treaſon, except an attempt to aſſaſſinate the king, unleſs the indictment be found within three years after the offence committed: next, that the priſoner ſhall have a copy of the indictment, (which includes the caption[k]) but not the names of the witneſſes, five days at leaſt before the trial; that is, upon the true conſtruction of the act, before his arraignment[l]; for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he ſhall alſo have a copy of the panel or jurors two days before his trial: and, laſtly, that he ſhall have the ſame compulſive proceſs to bring in his witneſſes *for* him, as was uſual to compel their appearance *againſt* him. And, by ſtatute 7 Ann. c. 21. (which did not take place till after the deceaſe of the late pretender) all perſons, indicted for high treaſon or miſpriſion

k Foſt. 229. Append. i. l *Ibid.* 230.

thereof, ſhall have not only a copy of the indictment, but a liſt of all the witneſſes to be produced, and of the jurors impanelled, with their profeſſions and places of abode, delivered to him ten days before the trial, and in the preſence of two witneſſes; the better to prepare him to make his challenges and defence. But this laſt act, ſo far as it affected indictments for the inferior ſpecies of high treaſon, reſpecting the coin and the royal ſeals, is repealed by the ſtatute 6 Geo. III. c. 53. elſe it had been impoſſible to have tried thoſe offences in the ſame circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time uſually allotted for any ſeſſion of *oyer* and *terminer* [m]. And no perſon indicted for felony is, or (as the law ſtands) ever can be, entitled to ſuch copies, before the time of his trial [n].

WHEN the trial is called on, the jurors are to be ſworn, as they appear, to the number of twelve, unleſs they are challenged by the party.

CHALLENGES may here be made, either on the part of the king, or on that of the priſoner; and either to the whole array, or to the ſeparate polls, for the very ſame reaſons that they may be made in civil cauſes [o]. For it is here at leaſt as neceſſary, as there, that the ſheriff or returning officer be totally indifferent; that where an alien is indicted, the jury ſhould be *de medietate*, or half foreigners, if ſo many are found in the place; (which does not indeed hold in treaſons [p], aliens being very improper judges of the breach of allegiance; nor yet in the caſe of Egyptians under the ſtatute 22 Hen. VIII. c. 10.) that on every panel there ſhould be a competent number of hundredors; and that the particular jurors ſhould be *omni exceptione majores;* not liable to objection either *propter honoris reſpectum*, *propter defectum*, *propter affectum*, or *propter delictum*.

m Foſt. 250.

n 2 Hawk. P. C. 410.

o See Vol. III. pag. 359.

p 2 Hawk. P. C. 420. 2 Hal. P. C. 271.

CHALLENGES upon any of the foregoing accounts are ſtiled challenges *for cauſe*; which may be without ſtint in both criminal and civil trials. But in criminal caſes, or at leaſt in capital ones, there is, *in favorem vitae*, allowed to the priſoner an arbitrary and capricious ſpecies of challenge to a certain number of jurors, without ſhewing any cauſe at all; which is called a *peremptory* challenge: a proviſion full of that tenderneſs and humanity to priſoners, for which our Engliſh laws are juſtly famous. This is grounded on two reaſons. 1. As every one muſt be ſenſible, what ſudden impreſſions and unaccountable prejudices we are apt to conceive upon the bare looks and geſtures of another; and how neceſſary it is, that a priſoner (when put to defend his life) ſhould have a good opinion of his jury, the want of which might totally diſconcert him; the law wills not that he ſhould be tried by any one man againſt whom he has conceived a prejudice, even without being able to aſſign a reaſon for ſuch his diſlike. 2. Becauſe, upon challenges for cauſe ſhewn, if the reaſon aſſigned prove inſufficient to ſet aſide the juror, perhaps the bare queſtioning his indifference may ſometimes provoke a reſentment; to prevent all ill conſequences from which, the priſoner is ſtill at liberty, if he pleaſes, peremptorily to ſet him aſide.

THIS privilege, of peremptory challenges, though granted to the priſoner, is denied to the king by the ſtatute 33 Edw. I. ſt. 4. which enacts, that the king ſhall challenge no jurors without aſſigning a cauſe certain, to be tried and approved by the court. However it is held, that the king need not aſſign his cauſe of challenge, till all the panel is gone through, and unleſs there cannot be a full jury without the perſons ſo challenged. And then, and not ſooner, the king's counſel muſt ſhew the cauſe: otherwiſe the juror ſhall be ſworn [q].

THE peremptory challenges of the priſoner muſt however have ſome reaſonable boundary; otherwiſe he might never

[q] 2 Hawk. P.C. 413. 2 Hal. P. C. 271.

be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries. For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason [r]. And so the law stands at this day with regard to treason, of any kind.

But by statute 22 Hen. VIII. c. 14. (which with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar. c. 10.) by this statute, I say, no person arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one, what shall be done? The old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law [s]: but the better opinion seems to be [t], that such challenge shall only be disregarded and overruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (or that of conviction, which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more "than twenty;" the evident construction of which is, that any farther challenge shall be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales*

r 2 Hal. P. C. 268.
s 2 Hawk. P. C. 414.
t 3 Inst. 227. 2 Hal. P. C. 270.

may

may be awarded as in civil causes [u], till the number of twelve is sworn, "well and truly to try, and true deliverance make, "between our sovereign lord the king, and the prisoner "whom they have in charge; and a true verdict to give, "according to their evidence."

WHEN the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown, or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated [w]. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular [x]) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it strictly speaking a part of our antient law: for the mirrour [y], having observed the necessity of counsel in civil suits, "who know how to forward and defend "the cause, by the rules of law and customs of the realm," immediately afterwards subjoins; "and more necessary are "they for defence upon indictments and appeals of felony, "than upon other venial causes [z]." And the judges themselves are so sensible of this defect, that they never scruple to allow a prisoner counsel to instruct him what questions to ask,

[u] See Vol. III. pag. 364. But, in mere commissions of gaol delivery, no *tales* can be awarded; though the court may *ore tenus* order a new panel to be returned *instanter*. (4 Inst. 68. 4 St. Tr. 728. Cooke's Case.)

[w] 2 Hawk. P. C. 400.

[x] Sir Edward Coke (3 Inst. 137.) gives another additional reason for this refusal, "because the evidence to con- "vict a prisoner should be so manifest, as "it could not be contradicted." Which, lord Nottingham (when high steward) declared (3 St. Tr. 726.) was the only good reason that could be given for it.

[y] c. 3. §. 1.

[z] Father Parsons the jesuit, and after him bishop Ellys, (of English liberty. ii. 26.) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Hen. I, meaning (I presume) chapter 47 and 48 of the code which is usually attributed to that prince. "*De causis criminalibus* "*vel*

aſk, or even to aſk queſtions for him, with reſpect to matters of fact: for as to matters of law, ariſing on the trial, they are *entitled* to the aſſiſtance of counſel. But, leſt this indulgence ſhould be intercepted by ſuperior influence, in the caſe of ſtate-criminals, the legiſlature has directed by ſtatute 7 W. III. c. 3. that perſons *indicted* for ſuch high treaſon, as works a corruption of the blood, or miſpriſion thereof, (except treaſon in counterfeiting the king's coin or ſeals) may make their full defence by counſel, not exceeding two, to be named by the priſoner and aſſigned by the court or judge: and the ſame indulgence, by ſtatute 20 Geo. II. c. 30. is extended to parliamentary *impeachments* for high treaſon, which were excepted in the former act.

THE doctrine of evidence upon pleas of the crown is, in in moſt reſpects, the ſame as that upon civil actions. There are however a few leading points, wherein, by ſeveral ſtatutes, and reſolutions, a difference is made between civil and criminal evidence.

FIRST, in all caſes of high treaſon, petit treaſon, and miſpriſion of treaſon, by ſtatutes 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. *two* lawful witneſſes are required to convict a priſoner; unleſs he ſhall willingly and without violence *confeſs* the ſame. By ſtatute 1 & 2 Ph. & Mar. c. 10. a farther exception is made as to treaſons in counterfeiting the king's ſeals or ſignatures, and treaſons concerning coin current within this realm; and more particularly by c. 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The ſtatutes 8 & 9 W. III. c. 25. & 15

"*vel capitalibus nemo quaerat conſilium*; "*quin implacitatus ſtatim perneget, ſine* "*omni petitione conſilii.—In aliis omnibus* "*poteſt et debet uti conſilio.*"—But this *conſilium*, I conceive, ſignifies only an *imparlance*, and the *petitio conſilii* is *craving leave to imparl*; (See Vol. III. pag. 298.) which is not allowable in any criminal proſecution. This will be manifeſt by comparing this law with a contemporary paſſage in the *grand couſtumier* of Normandy, (ch. 85.) which ſpeaks of imparlances in perſonal actions. "*Apres ce, eſt tenu le querelle a* "*reſpondre; et aura congie de ſoy con-* "*ſeiller, s'il le demande: et quand il* "*ſera conſeille il peut nyer le faict dont* "*il eſt accuſe.*" Or, as it ſtands in the Latin text, (*edit.* 1539.) "*Querelatus* "*autem poſtea tenetur reſpondere; et ha-* "*bebit licentiam conſulendi, ſi requirat;* "*habito autem conſilio, debet factum ne-* "*gare quo accuſatus eſt.*"

& 16 Geo. II. c. 28. in their ſubſequent extenſions of this ſpecies of treaſon do alſo provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence and in ſuch manner and form, as may be had and uſed againſt offenders for counterfeiting the king's money. But by ſtatute 7 W. III. c. 3. in proſecutions for thoſe treaſons to which that act extends, the ſame rule (of requiring *two* witneſſes) is again enforced; with this addition, that the *confeſſion* of the priſoner, which ſhall countervail the neceſſity of ſuch proof, muſt be in *open court*. In the conſtruction of which act it hath been holden [a], that a confeſſion of the priſoner, taken out of court, before a magiſtrate or perſon having competent authority to take it, and proved by two witneſſes, is ſufficient to convict him of treaſon. But haſty unguarded confeſſions, made to perſons having no ſuch authority, ought not to be admitted as evidence under this ſtatute. And indeed, even in caſes of felony at the common law, they are the weakeſt and moſt ſuſpicious of all teſtimony; ever liable to be obtained by artifice, falſe hopes, promiſes of favour, or menaces; ſeldom remembered accurately, or reported with due preciſion; and incapable in their nature of being diſproved by other negative evidence. By the ſame ſtatute 7 W. III. it is declared that both witneſſes muſt be to the ſame overt act of treaſon, or one to one overt act, and the other to another overt act, of the ſame ſpecies of treaſon [b], and not of diſtinct heads or kinds: and no evidence ſhall be admitted to prove any overt act not expreſsly laid in the indictment. And therefore in ſir John Fenwick's caſe, in king William's time, where there was but one witneſs, an act of parliament [c] was made on purpoſe to attaint him of treaſon, and he was executed [d]. But in almoſt every other accuſation one poſitive witneſs is ſufficient. Baron Monteſquieu lays it down for a rule [e], that thoſe laws which condemn a man to death *in any caſe* on the depoſition of a ſingle witneſs, are fatal to liberty: and he adds this reaſon, that the witneſs who affirms, and the accuſed who denies, make an equal balance [f]; there is a neceſſity therefore to call

[a] Foſter. 240—244.
[b] See St. Tr. II. 144. Foſter 235.
[c] Stat. 8 W. III. c. 4.
[d] Stat. Tr. V. 40.
[e] Sp. L. b. 12. c. 3.
[f] Beccar. c. 13.

in

in a third man to incline the ſcale. But this ſeems to be carrying matters too far: for there are ſome crimes, in which the very privacy of their nature excludes the poſſibility of having more than one witneſs; muſt theſe therefore eſcape unpuniſhed? Neither indeed is the bare denial of the perſon accuſed equivalent to the poſitive oath of a diſintereſted witneſs. In caſes of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witneſs is not allowed to convict a man indicted for perjury; becauſe then there is only one oath againſt another [f]. In caſes of treaſon alſo there is the accuſed's oath of allegiance, to counterpoiſe the information of a ſingle witneſs; and that may perhaps be one reaſon why the law requires a double teſtimony to convict him: though the principal reaſon, undoubtedly, is to ſecure the ſubject from being ſacrificed to fictitious conſpiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reverſal of colonel Sidney's attainder by act of parliament in 1689 [g] it may be collected [h], that the mere ſimilitude of hand-writing in two papers ſhewn to a jury, without other concurrent teſtimony, is no evidence that both were written by the ſame perſon; yet undoubtedly the teſtimony of witneſſes, well acquainted with the party's hand, that they believe the paper in queſtion to have been written by him, is evidence to be left to a jury [i].

THIRDLY, by the ſtatute 21 Jac. I. c. 27. a mother of a baſtard child, concealing it's death, muſt prove by one witneſs that the child was born dead; otherwiſe ſuch concealment ſhall be evidence of her having murdered it [k].

FOURTHLY, all preſumptive evidence of felony ſhould be admitted cautiouſly: for the law holds, that it is better that ten guilty perſons eſcape, than that one innocent ſuffer.

f 10 Mod. 194.

g St. Tr. VIII. 472.

h 2 Hawk. P. C. 431.

i Lord Preſton's caſe. *A. D.* 1690. St. Tr. IV. 453. Francia's caſe, *A. D.* 1716. St. Tr. VI. 69. Layer's caſe, *A. D.* 1722. *Ibid.* 279. Henzey's caſe. *A. D.* 1758. 4 Burr. 644.

k See pag. 198.

And

And ſir Matthew Hale in particular[l] lays down two rules, moſt prudent and neceſſary to be obſerved: 1. Never to convict a man for ſtealing the goods of a perſon unknown, merely becauſe he will give no account how he came by them, unleſs an actual felony be proved of ſuch goods: and, 2. Never to convict any perſon of murder or manſlaughter, till at leaſt the body be found dead; on account of two inſtances he mentions, where perſons were executed for the murder of others, who were then alive, but miſſing.

LASTLY, it was an antient and commonly received practice[m], (derived from the civil law, and which alſo to this day obtains in the kingdom of France[n]) that, as counſel was not allowed to any priſoner accuſed of a capital crime, ſo neither ſhould he be ſuffered to exculpate himſelf by the teſtimony of any witneſſes. And therefore it deſerves to be remembered, to the honour of Mary I, (whoſe early ſentiments, till her marriage with Philip of Spain, ſeem to have been humane and generous[o]) that when ſhe appointed ſir Richard Morgan chief juſtice of the common pleas, ſhe injoined him, "that notwithſtanding the old error, which "did not admit any witneſs to ſpeak, or any other matter "to be heard, in favour of the adverſary, her majeſty being "party; her highneſs's pleaſure was, that whatſoever could "be brought in favour of the ſubject ſhould be admitted to "be heard: and moreover, that the juſtices ſhould not perſuade themſelves to ſit in judgment otherwiſe for her highneſs than for her ſubject[p]." Afterwards, in one particular inſtance (when embezzling the queen's military ſtores was made felony by ſtatute 31 Eliz. c. 4.) it was provided that any perſon, impeached for ſuch felony, "ſhould be received "and admitted to make any lawful proof that he could, by "lawful witneſs or otherwiſe, for his diſcharge and defence:" and in general the courts grew ſo heartily aſhamed of a doctrine ſo unreaſonable and oppreſſive, that a practice was gradually introduced of examining witneſſes for the priſoner, but not

l 2 Hal. P. C. 200.
m St. Tr. I. *paſſim.*
n Domat. publ. law. b. 3. t. 1. Monteſq. Sp. L. b. 29. c. 11.
o See pag. 17.
p Hollingſh. 1112. St. Tr. I. 72.

not upon oath [q]: the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke [r] protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as *scintilla juris* against it [s]. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland [t], when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it [u] against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland [w], "that in all "such trials for the better discovery of the truth, and the "better information of the consciences of the jury and jus-"tices, there shall be allowed to the party arraigned the be-"nefit of such credible witnesses, to be examined upon oath, "as can be produced for his clearing and justification." At length by the statute 7 W. III. c. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2. c. 9. that in all cases of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.

WHEN the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity [x]) till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case which touches life or member, give a *privy* verdict [y]. But the judges may adjourn, while the jury are withdrawn to confer, and re-

q 2 Bulst. 147. Cro. Car. 292.

r 3 Inst. 79.

s See also 2 Hal. P. C. 283. and his summary. 264.

t Stat. 4 Jac. I. c. 1.

u Com. Journ. 4, 5. 12, 13, 15, 29. 30 Jun. 1607.

w *Ibid.* 4 Jun. 1607.

x Co. Litt. 227. 3 Inst. 110. Fost. 27. Gould's case, Hil. 1764.

y 2 Hal. P. C. 300. 2 Hawk. P. C. 439.

turn

which is an offence against the public police and oeconomy of the commonwealth.

THE statutes for preserving the game are many and various, and not a little obscure and intricate; it being remarked[i], that in one statute only, 5 Ann. c. 14. there is false grammar in no fewer than six places, besides other mistakes: the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not at present inquire. It is in general sufficient to observe, that the *qualifications* for killing game, as they are usually called, or more properly the *exemptions* from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100 *l per annum*; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire *(i)*: 2. A leasehold for ninety-nine years of 150 *l per annum*: 3. Being the son and heir apparent of an esquire (a very loose and vague description) or person of superior degree: 4. Being the owner, or keeper, of a forest, park, chase, or warren *(k)*. For unqualified persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game, or have it in possession, at unseasonable times of the year, or unseasonable hours of the day or night, on sundays or on Christmas day, there are various penalties assigned, corporal and pecuniary, by different statutes[k]; on any of which, but only on one at a time, the justices may convict in a summary way, or (in most of them) prosecutions may be carried on at the assises. And, lastly, by statute 28 Geo. II. c. 12. no person, however qualified to *kill*, may make merchandize of this valuable privilege, by *selling* or exposing to sale any game, on pain of like forfeiture as if he had no qualification.

i Burn's Justice, tit. Game. §. 3.   k *Ibid. eod. tit.*

(i) [If the estate be a freehold for *term of life* only, it must be of the clear yearly value of 150 *l*. Lowndes v. Lewis, East. term, 22 Geo. III. K. B.]

(k) [And by statute 25 Geo. III. c. 50. no person can destroy the game until he has delivered an account, in writing, of his name and place of abode to the clerk of the peace of the county where he lives, and taken out a certificate, for which he shall pay annually a stamp duty of 2 *l*. 2 *s*.]

CHAPTER THE FOURTEENTH.

OF HOMICIDE.

IN the ten preceding chapters we have considered, first, such crimes and misdemesnors as are more immediately injurious to God and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people: fourthly, such as more directly infringe the rights of the public or commonwealth, taken in it's collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure *individuals* or private subjects.

WERE these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our inquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, that,

that, besides the private satisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom by the texture of our constitution the *jus gladii*, or executory power of the law, entirely resides. Thus too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and thirdly, for the crime against the public by their evil example [a]. Of which we may trace the groundwork, in what Tacitus tells us of his Germans [b]; that, whenever offenders were fined, "*pars* "*mulctae regi, vel civitati, pars ipsi qui vindicatur vel propin-* "*quis ejus, exsolvitur.*"

THESE crimes and misdemesnors against private subjects are principally of three kinds; against their *persons*, their *habitations*, and their *property*.

OF crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great creator; and of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be the offence of *homicide* or destroying the life of man, in it's several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

NOW homicide, or the killing of any human creature, is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second very little; but the

a Stiernhook. *l.* 1. *c.* 5.

b *de mor. Germ. c.* 12.

"*tunt.*" 3. In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law [o], and by the riot act, 1 Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape [p]. 5. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain; by virtue of the statute 21 Edw. I. st. 2. *de malefactoribus in parcis*, and 3 & 4 W. & M. c. 10. But, in all these cases, there must be an apparent necessity on the officer's side; *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. 6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth [q].

3. IN the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature [r]; and also by the law of England, as it stood so early as the time of Bracton [s], and as it is since declared by statute 24 Hen. VIII. c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house *in the night time*, (which extends also to an attempt to burn it [t]) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable, in case of *nocturnal* house-breaking; "if a thief be found breaking up, and he be smitten

[o] 1 Hal. P. C. 495. 1 Hawk. P. C. 161.

[p] 1 Hal. P. C. 496.

[q] 1 Hawk. P. C. 71.

[r] Puff. L. of N. l. 2. c. 5.

[s] *fol.* 155.

[t] 1 Hal. P. C. 488.

"that he die, no blood ſhall be ſhed for him: but if the ſun "be riſen upon him, there ſhall blood be ſhed for him; for "he ſhould have made full reſtitution[u]." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact[w]: and, by the Roman law of the twelve tables, a thief might be ſlain by night with impunity; or even by day, if he armed himſelf with any dangerous weapon[x]: which amounts very nearly to the ſame as is permitted by our own conſtitutions.

THE Roman law alſo juſtifies homicide, when committed in defence of the chaſtity either of one's ſelf or relations[y]: and ſo alſo, according to Selden[z], ſtood the law in the Jewiſh republic. The Engliſh law likewiſe juſtifies a woman, killing one who attempts to raviſh her[a]: and ſo too the huſband or father may juſtify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by conſent, for the one is forcible and felonious, but not the other[b]. And I make no doubt but the forcibly attempting a crime of a ſtill more deteſtable nature, may be equally reſiſted by the death of the unnatural aggreſſor. For the one uniform principle that runs through our own, and all other laws, ſeems to be this; that where a crime, in itſelf capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we muſt not carry this doctrine to the ſame viſionary length that Mr. Locke does: who holds[c], "that all "manner of force without right upon a man's perſon, puts "him in a ſtate of war with the aggreſſor; and, of conſe"quence, that, being in ſuch a ſtate of war, he may law"fully kill him that puts him under this unnatural reſtraint." However juſt this concluſion may be in a ſtate of uncivilized nature, yet the law of England, like that of every other

u Exod. xxii. 2.

w Potter. Antiq. b. 1. c. 24.

x Cic. *pro Milone*. 3. *Ff*. 9. 2. 4.

y "*Divus Hadrianus reſcripſit, eum "qui ſtuprum ſibi vel ſuis inferentem occi"dit, dimittendum.*" (*Ff*. 48. 8. 1.)

z *de legib. Hebræor. l*. 4. *c*. 3.

a Bac. Elem. 34. 1 Hawk. P. C. 71.

b 1 Hal. P. C. 485, 486.

c Eſſ. on gov. p. 2. c. 5.

well-

well-regulated community, is too tender of the public peace, too careful of the lives of the ſubjects, to adopt ſo contentious a ſyſtem; nor will ſuffer with impunity any crime to be *prevented* by death, unleſs the ſame, if committed, would alſo be *puniſhed* by death.

IN theſe inſtances of *juſtifiable* homicide, it may be obſerved that the ſlayer is in no kind of fault whatſoever, not even in the minuteſt degree; and is therefore to be totally acquitted and diſcharged, with commendation rather than blame. But that is not quite the caſe in *excuſable* homicide, the very name whereof imports ſome fault, ſome error, or omiſſion; ſo trivial however, that the law excuſes it from the guilt of felony, though in ſtrictneſs it judges it deſerving of ſome little degree of puniſhment.

II. EXCUSABLE homicide is of two ſorts; either *per infortunium*, by miſadventure; or *ſe defendendo*, upon a principle of ſelf-preſervation. We will firſt ſee wherein theſe two ſpecies of homicide are diſtinct, and then wherein they agree.

1. HOMICIDE *per infortunium* or *miſadventure*, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a ſtander-by; or, where a perſon qualified to keep a gun, is ſhooting at a mark, and undeſignedly kills a man [d]: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a maſter his apprentice or ſcholar, or an officer puniſhing a criminal, and happens to occaſion his death, it is only miſadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the inſtrument, or the quantity of puniſhment, and death enſues, it is manſlaughter at leaſt, and in ſome caſes (according to the circumſtances) murder [e]; for the act of immoderate correction is unlawful.

[d] 1 Hawk. P. C. 73, 74.

[e] 1 Hal. P. C. 473, 474.

Thus by an edict of the emperor Constantine[f], when the rigor of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner "*immoderate suo jure utatur, tunc* "*reus homicidii sit.*"

BUT, to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and swordplaying, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command, or permit such diversion, it is said to be only misadventure; for then the act is lawful[g]. In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the state, was not held to be guilty of homicide[h]. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence[i]. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts[k].

2. HOMICIDE in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only

f *Cod. l.* 9. *t.* 14.
g 1 Hal. P.C. 473. 1 Hawk. P. C. 74.
h Plato. *de LL. lib.* 7. *Ff.* 9. 2. 7.
i 1 Hawk. P. C. 73.
k *Ibid.* 74. 1 Hal. P. C. 472. Fost. 261.

a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*; the former of which in it's etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5. and our antient books[l], that it is properly applied to such killing as happens in self-defence upon a sudden rencounter[m]. This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

IT is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) from that of manslaughter, in the proper, legal sense of the word[n]. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence[o]. For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he

l Staunf. P. C. 16.

m 3 Inst. 55. 57. Fost. 275, 276.

n 3 Inst. 55.

o Fost. 277.

conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honour: because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves [p]. In this the civil law also agrees with ours, or perhaps goes rather farther; "*qui cum aliter tueri se non possunt, damni culpam* "*dederint, innoxii sunt* [q]." The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him [r]: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice [s], as well as of the municipal law.

AND, as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design [t]. But if A upon a sudden quarrel assaults B first, and upon B's returning the assault, A really and *bona fide* flees; and, being driven to the wall, turns again upon B and kills him; this may be *se defendendo* according to some of our writers [u]:

p 1 Hal. P. C. 481. 483.
q *Ff.* 9. 2. 45.
r 1 Hal. P. C. 483.
s Puff. b. 2. c. 5. §. 13.
t 1 Hal. P. C. 479.
u 1 Hal. P. C. 482.

though others[w] have thought this opinion too favourable; inaſmuch as the neceſſity, to which he is at laſt reduced, originally aroſe from his own fault. Under this excuſe, of ſelf-defence, the principal civil and natural relations are comprehended; therefore maſter and ſervant, parent and child, huſband and wife, killing an aſſailant in the neceſſary defence of each other reſpectively, are excuſed; the act of the relation aſſiſting being conſtrued the ſame as the act of the party himſelf[x].

THERE is one ſpecies of homicide *ſe defendendo*, where the party ſlain is equally innocent as he who occaſions his death: and yet this homicide is alſo excuſable from the great univerſal principle of ſelf-preſervation, which prompts every man to ſave his own life preferable to that of another, where one of them muſt inevitably periſh. As, among others, in that caſe mentioned by lord Bacon[y], where two perſons, being ſhipwrecked, and getting on the ſame plank, but finding it not able to ſave them both, one of them thruſts the other from it, whereby he is drowned. He who thus preſerves his own life at the expenſe of another man's, is excuſable through unavoidable neceſſity, and the principle of ſelf-defence; ſince their both remaining on the ſame weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

LET us next take a view of thoſe circumſtances wherein theſe two ſpecies of homicide, by miſadventure and ſelf-defence, agree; and thoſe are in their blame and puniſhment. For the law ſets ſo high a value upon the life of a man, that it always intends ſome miſbehaviour in the perſon who takes it away, unleſs by the command or expreſs permiſſion of the law. In the caſe of miſadventure, it preſumes negligence, or at leaſt a want of ſufficient caution in him who was ſo unfortunate as to commit it; who therefore is not altogether faultleſs[z]. And as to the neceſſity which excuſes a man who

w 1 Hawk. P. C. 75.
x 1 Hal. P. C. 484.
y Elem. c. 5. See alſo 1 Hawk. P. C. 73.
z 1 Hawk. P. C. 72.

kills

kills another *se defendendo*, lord Bacon[a] entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side. The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

NOR is the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it. And the mosaical law[b] appointed certain cities of refuge for him "who "killed his neighbour unawares: as if a man goeth into "the wood with his neighbour to hew wood, and his hand "fetcheth a stroke with the ax to cut down a tree, and the "head slippeth from the helve, and lighteth upon his neighbour that he die, he shall flee unto one of these cities "and live." But it seems he was not held wholly blameless, any more than in the English law; since the avenger of blood might slay him before he reached his asylum, or if he afterwards stirred out of it till the death of the high priest. In the imperial law likewise[c] casual homicide was excused, by the indulgence of the emperor signed with his own sign manual, "*adnotatione principis*:" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks[d] homicide by misfortune was expiated by voluntary

[a] Elem. c. 5.
[b] Numb. c. 35. and Deut. c. 19.
[c] *Cod.* 9. 16. 5.
[d] Plato. *de Leg. lib.* 9.

banish-

banishment for a year[e]. In Saxony a fine is paid to the kindred of the slain; which also, among the Western Goths, was little inferior to that of voluntary homicide[f]: and in France[g] no person is ever absolved in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed.

THE penalty inflicted by our laws is said by sir Edward Coke to have been antiently no less than death[h]; which however is with reason denied by later and more accurate writers[i]. It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*[k]: which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul, who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach[l], a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same[m]. And indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal[n].

III. FELONIOUS homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

e To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third iliad, that when a child, he was obliged to flee his country for casually killing his playfellow; "νηπιος ὀυκ ἐθελων."

f Stiernh. *de jure Goth.* *l.* 3. *c.* 4.

g De Mornay, on the digest.

h 2 Inst. 148. 315.

i 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Fost. 282, *&c.*

k Fost. 287.

l Fost. 283.

m 2 Hawk. P. C. 381.

n Fost. 288.

SELF-MURDER, the pretended heroiſm, but real cowardice, of the Stoic philoſophers, who deſtroyed themſelves to avoid thoſe ills which they had not the fortitude to endure, though the attempting it ſeems to be countenanced by the civil law [o], yet was puniſhed by the Athenian law with cutting off the hand, which committed the deſperate deed [p]. And alſo the law of England wiſely and religiouſly conſiders, that no man hath a power to deſtroy life, but by commiſſion from God, the author of it: and, as the ſuicide is guilty of a double offence; one ſpiritual, in invading the prerogative of the Almighty, and ruſhing into his immediate preſence uncalled for; the other temporal, againſt the king, who hath an intereſt in the preſervation of all his ſubjects; the law has therefore ranked this among the higheſt crimes, making it a peculiar ſpecies of felony, a felony committed on one's ſelf. And this admits of acceſſories before the fact, as well as other felonies; for if one perſuades another to kill himſelf, and he does ſo, the adviſer is guilty of murder [q]. A *felo de ſe* therefore is he that deliberately puts an end to his own exiſtence, or commits any unlawful malicious act, the conſequence of which is his own death: as if attempting to kill another, he runs upon his antagoniſt's ſword: or, ſhooting at another, the gun burſts and kills himſelf [r]. The party muſt be of years of diſcretion, and in his ſenſes, elſe it is no crime. But this excuſe ought not to be ſtrained to that length, to which our coroner's juries are apt to carry it, *viz.* that the very act of ſuicide is an evidence of inſanity; as if every man, who acts contrary to reaſon, had no reaſon at all: for the ſame argument would prove every other criminal *non compos*, as well as the ſelf-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of diſcerning right from wrong; which is neceſſary, as was obſerved in a former chapter [ſ], to

o "*Si quis impatientia doloris, aut taedio vitae, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*" *Ff.* 49. 16. 6.

p Pott. Antiq. b. 1. c. 26.

q Keilw. 136.

r 1 Hawk. P. C. 68. 1 Hal. P. C. 413.

ſ See pag. 24.

form a legal excuſe. And therefore if a real lunatic kills himſelf in a lucid interval, he is a *felo de ſe* as much as another man [s].

BUT now the queſtion follows, what puniſhment can human laws inflict on one who has withdrawn himſelf from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former by an ignominious burial in the highway, with a ſtake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be ſome motive to reſtrain him from ſo deſperate and wicked an act. And it is obſervable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cauſe of his death. As if huſband and wife be poſſeſſed jointly of a term of years in land, and the huſband drowns himſelf; the land ſhall be forfeited to the king, and the wife ſhall not have it by ſurvivorſhip. For by the act of caſting himſelf into the water he forfeits the term; which gives a title to the king, prior to the wife's title by ſurvivorſhip, which could not accrue till the inſtant of her huſband's death [t]. And though it muſt be owned that the letter of the law herein borders a little upon ſeverity, yet it is ſome alleviation that the power of mitigation is left in the breaſt of the ſovereign, who upon this (as on all other occaſions) is reminded by the oath of his office to execute judgment in mercy.

THE other ſpecies of criminal homicide is that of killing another man. But in this there are alſo degrees of guilt, which divide the offence into *manſlaughter* and *murder*. The difference between which may be partly collected from what has been incidently mentioned in the preceding articles, and principally conſiſts in this, that manſlaughter (when voluntary) ariſes from the ſudden heat of the paſſions, murder from the wickedneſs of the heart.

[s] 1 Hal. P. C. 412. [t] Finch. L. 216.

1. MAN-

1. MANSLAUGHTER is therefore thus defined [u], the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. These were called in the Gothic constitutions "*homicidia vulgaria; quae aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiae calore et impetu* [w]." And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion [x]: and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter [y]. But in this, and in every other case of homicide, upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder [z]. So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solon [a], as likewise by the Roman civil law, (if the adulterer was found in the husband's own house [b]) and also among the antient Goths [c]; yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape,

u 1 Hal. P. C. 466.
w Stiern. *de jure Goth. l.* 3. *c.* 4.
x 1 Hawk. P. C. 82.
y Kelyng. 135.
z Fost. 296.
a Plutarch. *in vit. Solon.*
b *Ff.* 48. 5. 24.
c Stiernh. *de jure Goth. l.* 3. *c.* 2.

but it is manslaughter [d]. It is however the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation [e]. Manslaughter therefore on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

THE second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful, but it is not murder, for the one had no intent to do the other any personal mischief [f]. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengets are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning [g]; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind [h]. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter [j] according to the nature of the act which occasioned it. If it be in prosecution of a felonious

d 1 Hal. P. C. 486.

e Sir T. Raym. 212.

f 3 Inst. 56.

g Kel. 40.

h 3 Inst. 57.

j Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by statute 10 Geo. II. c. 31. if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.

intent,

intent, or in it's consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter [i].

NEXT, as to the *punishment* of this degree of homicide; the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.

BUT there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. I. c. 8. when one throsts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English, at the accession of James the first [k]; and, being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt: unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the stature sofavourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing, as it did at the common law [l]. Thus, (not to repeat the cases before-mentioned, of stabbing an adulteress, *&c.* which are barely manslaughter, as at common law) in the construction of this statute it hath been doubted, whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and it seems to be the better opinion, that this is not within the statute [m]. Also it hath been resolved, that the killing a man by

[i] Foster. 258. 1 Hawk. P. C. 84.
[k] 1 Lord Raym. 140.
[l] Fost. 299, 300.
[m] Fost. 301. 1 Hawk. P. C. 77.

by throwing a hammer or other blunt weapon is not within the ſtatute; and whether a ſhot with a piſtol be ſo or not, is doubted[n]. But if the party ſlain had a cudgel in his hand, or had thrown a pot or a bottle, or diſcharged a piſtol at the party ſtabbing; this is a ſufficient having a weapon drawn on his ſide within the words of the ſtatute[o].

2. WE are next to conſider the crime of deliberate and wilful *murder;* a crime at which human nature ſtarts, and which is I believe puniſhed almoſt univerſally throughout the world with death. The words of the moſaical law (over and above the general precept to Noah[p], that "whoſo ſheddeth "man's blood, by man ſhall his blood be ſhed") are very emphatical in prohibiting the pardon of murderers[q]. "More-"over ye ſhall take no ſatisfaction for the life of a murder-"er, who is guilty of death, but he ſhall ſurely be put to "death; for the land cannot be cleanſed of the blood that "is ſhed therein, but by the blood of him that ſhed it." And therefore our law has provided one courſe of proſecution, (that by appeal, of which hereafter) wherein the king himſelf is excluded the power of pardoning murder: ſo that, were the king of England ſo inclined, he could not imitate that Poliſh monarch mentioned by Puffendorf[r]: who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris "rigorem moderantes, &c.*" But let us now conſider the definition of this great offence.

THE name of *murder* (as a crime) was antiently applied only to the ſecret killing of another[s]: (which the word, *moerda*, ſignifies in the Teutonic language[t]) and it was defined, "*ho-"micidium quod nullo vidente, nullo ſciente, clam perpetratur*[u]:" for which the vill wherein it was committed, or (if that were

n 1 Hal. P. C. 470.

o 1 Hawk. P. C. 77.

p Gen. ix. 6.

q Numb. xxxv. 31.

r L. of N. b. 8. c. 3.

s *Dial. de Scacch. l.* 1. *c.* 10.

t Stiernh. *de jure Sueon. l.* 3. *c.* 3. The word *murdre* in our old ſtatutes alſo ſignified any kind of concealment or ſtifling. So in the ſtatute of Exeter, 14 Edw. I. "*je riens ne celerai, ne ſuf-"frai eſtre celé ne murdré:*" which is thus tranſlated in Fleta, *l.* 1. *c.* 18. §. 4. "*Nullam veritatem celabo, nec celari per-"mittam nec murdrari.*" And the words "*pur murdre le droit*" in the articles of that ſtatute, are rendered in Fleta *ibid.* §. 8. "*pro jure alicujus murdriendo.*"

u Glanv. *l.* 14. *c.* 3.

too poor) the whole hundred was liable to a heavy amercement; which amercement itſelf was alſo denominated *murdrum* [w]. This was an antient uſage among the Goths in Sweden and Denmark; who ſuppoſed the neighbourhood, unleſs they produced the murderer, to have perpetrated or at leaſt connived at the murder [x]: and, according to Bracton [y], was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the Engliſh; and was afterwards continued by William the conqueror, for the like ſecurity to his own Normans [z]. And therefore if, upon inquiſition had, it appeared that the perſon found ſlain was an Engliſhman, (the preſentment whereof was denominated *engleſcherie* [a]) the country ſeems to have been excuſed from this burthen. But, this difference being totally aboliſhed by ſtatute 14 Edw. III. c. 4. we muſt now (as is obſerved by Staundforde [b]) define murder in quite another manner, without regarding whether the party ſlain was killed openly or ſecretly, or whether he was of Engliſh or foreign extraction.

MURDER is therefore now thus defined, or rather deſcribed, by ſir Edward Coke [c]; "when a perſon, of ſound "memory and diſcretion, unlawfully killeth any reaſonable "creature in being, and under the king's peace, with malice "aforethought, either expreſs or implied." The beſt way of examining the nature of this crime will be by conſidering the ſeveral branches of this definition.

FIRST, it muſt be committed by *a perſon of ſound memory and diſcretion:* for lunatics or infants, as was formerly obſerved, are incapable of committing any crime: unleſs in ſuch caſes where they ſhew a conſciouſneſs of doing wrong, and of courſe a diſcretion, or diſcernment, between good and evil.

NEXT, it happens when a perſon of ſuch ſound diſcretion *unlawfully killeth*. The unlawfulneſs ariſes from the killing

w Bract. *l.* 3. *tr.* 2. *c.* 15. §. 7. Stat. Marlbr. *c.* 26. Foſt. 281.

x Stiernh. *l.* 3. *c.* 4.

y *l.* 3. *tr.* 2. *c.* 15.

z 1 Hal. P. C. 447.

a Bract. *ubi ſupr.*

b P. C. *l.* 1. *c.* 10.

c 3 Inſt. 47.

without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemesnor, though formerly it was held to be murder[d]. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol or *starving*. But where they only differ in circumstance, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial[e]. Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought[f]. And therefore by the statute 22 Hen. VIII. c. 9. it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death: but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was also, by the antient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past[g]: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed[h]. The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor; "*peculiari poena judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam*[i]." And, among the Romans, the *lex Cornelia, de sicariis*, punished the false witness with death, as being guilty of a species of assassination[k]. And there is no doubt but this is equally murder *in foro conscientiae* as kill-

d 1 Hal. P. C. 425.

e 3 Inst. 319. 2 Hal. P. C. 185.

f 3 Inst. 48.

g Fost. 132. In the case of Macdaniel and Berry, reported by sir Michael Foster, though the then attorney general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution.

h Mirror. c. 1. §. 9. Brit. c. 52. Bracton. *l.* 3. *c.* 4.

i Stiernh. *de jure Goth. l.* 3. *c.* 3.

k *Ff.* 48. 8. 1.

ing with a ſword; though the modern law (to avoid the danger of deterring witneſſes from giving evidence upon capital proſecutions, if it muſt be at the peril of their own lives) has not yet puniſhed it as ſuch. If a man however does ſuch an act, of which the probable conſequence may be, and eventually is, death; ſuch killing may be murder, although no ſtroke be ſtruck by himſelf, and no killing may be primarily intended: as was the caſe of the unnatural ſon, who expoſed his ſick father to the air, againſt his will, by reaſon whereof he died[l]; of the harlot, who laid her child under leaves in an orchard, where a kite ſtruck it and killed it[m]; and of the pariſh-officers, who ſhifted a child from pariſh to pariſh, till it died for want of care and ſuſtenance[n]. So too, if a man hath a beaſt that is uſed to do miſchief; and he, knowing it, *ſuffers* it to go abroad, and it kills a man; even this is manſlaughter in the owner: but if he had purpoſely *turned it looſe*, though barely to frighten people and make what is called ſport, it is with us (as in the Jewiſh law) as much murder, as if he had incited a bear or dog to worry them[o]. If a phyſician or ſurgeon gives his patient a potion or plaiſter to cure him, which contrary to expectation kills him, this is neither murder, nor manſlaughter, but miſadventure; and he ſhall not be puniſhed criminally, however liable he might formerly have been to a civil action for neglect or ignorance[p]: but it hath been holden, that if it be not a *regular* phyſician or ſurgeon, who adminiſters the medicine or performs the operation, it is manſlaughter at the leaſt[q]. Yet ſir Matthew Hale very juſtly queſtions the law of this determination[r]. In order alſo to make the killing murder, it is requiſite that the party die within a year and a day after the ſtroke received, or cauſe of death adminiſtered; in the computation of which, the whole day upon which the hurt was done ſhall be reckoned the firſt[s].

FARTHER; the perſon killed muſt be "*a reaſonable creature in being, and under the king's peace*," at the time of the killing,

[l] 1 Hawk. P. C. 78.
[m] 1 Hal. P. C. 432.
[n] Palm. 545.
[o] *Ibid* 431.
[p] Mirr. c. 4. §. 16. See Vol. III. pag. 122.
[q] Britt. c. 5. 4 Inſt. 251.
[r] 1 Hal. P. C. 430.
[s] 1 Hawk. P. C. 79.

killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war[t]. To kill a child in it's mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them[u]. But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I. c. 27. that if any woman be delivered of a child which if born alive should by law be a bastard; and endeavours privately to conceal it's death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead. This law, which savours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French[v]: But I apprehend it has of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child, whose death is concealed, was therefore killed by it's parent) is admitted to convict the prisoner.

LASTLY, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing: and this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart[w]: *un disposition a faire un male chose*[x]: and it may be either *express*, or *implied* in law. Express

t 3 Inst. 50. 1 Hal. P. C. 433.
u 3 Inst. 50. 1 Hawk. P. C. 80. but see 1 Hal. P. C. 433.
v See Barrington on the statutes. 425.
w Foster. 256.
x 2 Roll. Rep. 461.

malice

malice is when one, with a ſedate deliberate mind and formed deſign, doth kill another: which formed deſign is evidenced by external circumſtances diſcovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted ſchemes to do him ſome bodily harm [y]. This takes in the caſe of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and thoſe of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has juſtly fixed the crime and puniſhment of murder, on them, and on their ſeconds alſo [z]. Yet it requires ſuch a degree of paſſive valour, to combat the dread of even undeſerved contempt, ariſing from the falſe notions of honour too generally received in Europe, that the ſtrongeſt prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy cuſtom; till a method be found out of compelling the original aggreſſor to make ſome other ſatisfaction to the affronted party, which the world ſhall eſteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the perſon inſulted, as of him who hath given the inſult. Alſo, if even upon a ſudden provocation one beats another in a cruel and unuſual manner, ſo that he dies, though he did not intend his death, yet he is guilty of murder by expreſs malice; that is, by an expreſs evil deſign, the genuine ſenſe of *malitia*. As when a parkkeeper tied a boy, that was ſtealing wood, to a horſe's tail, and dragged him along the park; when a maſter corrected his ſervant with an iron bar, and a ſchoolmaſter ſtamped on his ſcholar's belly; ſo that each of the ſufferers died; theſe were juſtly held to be murders, becauſe the correction being exceſſive, and ſuch as could not proceed but from a bad heart, it was equivalent to a deliberate act of ſlaughter [a]. Neither ſhall he be guilty of a leſs crime, who kills another in con-

y 1 Hal. P. C. 451.
z 1 Hawk. P. C. 82.
a 1 Hal. P. C. 454. 473, 474.

ſequence of ſuch a wilſul act, as ſhews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do miſchief [b], upon a horſe uſed to ſtrike, or coolly diſcharging a gun, among a multitude of people [c]. So if a man reſolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is univerſal malice. And, if two or more come together to do an unlawful act againſt the king's peace, of which the probable conſequence might be bloodſhed; as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, becauſe of the unlawful act, the *malitia praecogitata*, or evil intended beforehand [d].

ALSO in many caſes where no malice is expreſſed, the law will imply it: as, where a man wilfully poiſons another, in ſuch a deliberate act the law preſumes malice, though no particular enmity can be proved [e]. And if a man kills another ſuddenly, without any, or without a conſiderable provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight or no apparent cauſe. No affront, by words or geſtures only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence as manifeſtly endanger the life of another [f]. But if the perſon ſo provoked had unfortunately killed the other, by beating him in ſuch a manner as ſhewed only an intent to chaſtiſe and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder [g]. In like manner if one kills an officer of juſtice, either civil or criminal, in the execution of his duty, or any of his aſſiſtants endeavouring to conſerve the peace, or any private perſon endeavouring to ſuppreſs an affray or apprehend a felon, knowing his authority or the intention with which he interpoſes, the law will imply malice, and the killer ſhall be guilty of murder [h]. And if one intends to do another felony,

b Lord Raym. 143.

c 1 Hawk. P. C. 74.

d *Ibid.* 84.

e 1 Hal. P. C. 455.

f 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.

g Foſt. 291.

h 1 Hal. P. C. 457. Foſter, 308, *&c.*

and

and undesignedly kills a man, this is also murder[i]. Thus if one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder[j]. So also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it[k]. It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence[l].

THE punishment of murder, and that of manslaughter, were formerly one and the same; both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime[m]. But now, by several statutes[n], the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place

i 1 Hal. P. C. 465.

j *Ibid.* 466.

k *Ibid.* 429.

l Fost. 255.

m 1 Hal. P. C. 450.

n 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 4 & 5 Ph. & M. c. 4.

where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. This, being quite contrary to the express command of the mosaical law[o], seems to have been borrowed from the civil law; which, besides the terror of the example, gives also another reason for this practice, *viz.* that it is a comfortable sight to the relations and friends of the deceased[p]. But now in England, it is enacted by statute 25 Geo. II. c. 37. that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one, (unless the same shall be sunday, and then on the monday following) and that his body be delivered to the surgeons to be dissected and anatomized[q]; and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. And, during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge upon good and sufficient cause to respite the execution, and relax the other restraints of this act.

BY the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea[r]. Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity[s]. And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, we must account for

o "The body of a malefactor shall "not remain all night upon the tree; "but thou shalt in any wise bury him "that day, that the land be not de-"filed." Deut. xxi. 23.

p "*Famosos latrones, in his locis, ubi grassati sunt, furca figendos placuit; ut, et conspectu deterreantur alii, et solatio sit cognatis interemptorum, eodem loco poena reddita, in quo latrones homicidia fecissent.*" *Ff.* 48. 19. 28. §. 15.

q Fost. 107.

r *Ff.* 48. 9. 9.

s Cic. *pro S. Roscio.* §. 25.

the

the omission of an exemplary punishment for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent [s].

For, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connexions, when coupled with murder, denominates it a new offence, no less than a species of treason, called *parva proditio*, or *petit treason*: which however is nothing else but an aggravated degree of murder [t]; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason [u]. And thus, in the antient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign [w].

Petit treason, according to the statute 25 Edw. III. c. 2. may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular, or regular) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason: for the traiterous intention was hatched while the relation subsisted between them; and this is only an execution of that intention [x]. So if a wife be divorced *a mensa et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband, she is a traitress [y]. And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason [z]. As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in

[s] 1 Hal. P. C. 380.

[t] Foster. 107. 324. 336.

[u] See pag. 75.

[w] "*Omnium gravissima censetur vis facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores, (et vice versa) servis in dominos, aut etiam ab homine in semet ipsum.*" Stiernh. *de jure Goth. l.* 3. *c.* 3.

[x] 1 Hawk. P.C. 89. 1 Hal. P.C. 380.

[y] 1 Hal. P. C. 381.

[z] *Ibid.*

it's most odious degree: except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III[a]. But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder[b]: and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in it's punishment.

THE punishment of petit treason, in a man, is to be drawn and hanged, and in a woman, to be drawn and burned[c] (*a*): the idea of which latter punishment seems to have been handed down to us by the laws of the antient Druids, which condemned a woman to be burned for murdering her husband[d]; and it is now the usual punishment for all sorts of treasons committed by those of the female sex[e]. Persons guilty of petit treason were first debarred the benefit of clergy, by statute 12 Hen. VII. c. 7. which has been since extended to their aiders, abettors, and counsellors, by statutes 23 Hen. VIII. c. 1. and 4 & 5 P. & M. c. 4.

[a] Fost. 337.
[b] Foster. 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.
[c] 1 Hal. P. C. 382. 3 Inst. 311.
[d] Caesar *de bell. Gall. l.* 6. *c.* 18.
[e] See pag. 93.

(*a*) But this is now altered by statute 30 Geo. 3. c. 48. which enacts that in all cases of conviction of any woman for high or petit treason, the judgment shall be that she shall be drawn and hanged, and not burned: and if any woman shall be convicted of petit treason she shall be liable to such farther pains and penalties as are declared by statute 25 Geo. III. c. 37. with respect to persons convicted of wilful murder.

CHAPTER THE FIFTEENTH.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

HAVING in the preceding chapter confidered the principal crime, or public wrong, that can be committed againft a private fubject, namely, by deftroying his life; I proceed now to inquire into fuch other crimes and mifdemefnors, as more peculiarly affect the fecurity of his perfon, while living.

OF thefe fome are felonious, and in their nature capital: others are fimple mifdemefnors, and punifhable with a lighter animadverfion. Of the felonies the firft is that of *mayhem*.

I. MAYHEM, *mayhemium*, was in part confidered in the preceding volume [a], as a civil injury: but it is alfo looked upon in a criminal light by the law; being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and affiftance of his fubjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the ufe of fuch of his members as may render him the lefs able in fighting, either to defend himfelf, or to annoy his adverfary [b]. And therefore the cutting off, or difabling, or weakening a man's hand or finger, or ftriking out his eye or foretooth, or depriving him of thofe parts, the lofs of which in all animals abates their courage, are held to

[a] See Vol. III. pag. 121.

[b] Brit. *l.* 1. *c.* 25. 1 Hawk. P. C. 111.

be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

BY the antient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro*[c]: which is still the law in Sweden[d]. But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn[e], is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment[f]; unless perhaps the offence of mayhem by castration, which all our old writers held to be felony; "*et sequitur aliquando poena capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione*[g]." And this, although the mayhem was committed upon the highest provocation[h].

BUT subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Hen. IV. c. 5. to remedy a mischief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his *tongue*, or putting out his *eyes*, to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as sir Edward Coke[i] explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute 37 Hen. VIII. c. 6. which directs, that if a man shall maliciously and unlawfully cut off the *ear* of any of the king's subjects, he shall not only forfeit treble damages to

c 3 Inst. 118.—*Mes, si la pleynte soit faite de femme qu' avera tollet a home ses membres, en tiel case perdra le feme la une meyn par jugement, come le membre dount ele avera trespassé.* (Brit. c. 25)

d Stiernhook *de jure Sueon. l. 3. t. 3.*

e See pag. 12.

f 1 Hawk. P. C. 112.

g Bract. *fol.* 144.

h Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the third's time, (*Claus.* 13 *Hen. III.* m. 9.) by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

i 3 Inst. 62.

the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 10*l* by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II. c. 1. called the Coventry act; being occasioned by an assault on sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or to disfigure him;* such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy [k].

THUS much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any person, in any dwelling-house or other place; an offence, of which the probable consequence may be either killing or maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22. and thereupon one Arnold was convicted in 1723 for shooting at lord Onslow; but, being half a mad-

[k] On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact, of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare intent to murder is no felony; but to disfigure, with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder; and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this statute; and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials. VI. 212.)

man, was never executed, but confined in prison, where he died about thirty years after *(l)*.

II. THE second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their *forcible abduction* and *marriage*; which is vulgarly called *stealing an heiress*. For by statute 3 Hen. VII. c. 2. it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons: and by statute 39 Eliz. c. 9. the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessories *before* the fact.

IN the construction of this statute it hath been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute [l]. 2. In order to shew this, it must appear that the woman has substance either real or personal, or is an heir apparent [m]. 3. It must appear that she was taken away against her will. 4. It must also appear, that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will [n]: and so *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may, from that time, as properly

[l] 1 Hawk. P. C. 110.

[m] 1 Hal. P. C. 660. 1 Hawk. P. C. 109.

[n] 1 Hal. P. C. 660.

(l) [So maliciously shooting at, or dangerously wounding any officer of the navy, customs, or excise, in the execution of his duty, is made felony without benefit of clergy by statute 24 Geo. 3 sess. 2. c. 47. s. 11.]

be ſaid to be taken againſt her will, as if ſhe never had given any conſent at all; for, till the force was put upon her, ſhe was in her own power [o]. It is held that a woman, thus taken away and married, may be ſworn and give evidence againſt the offender, though he is her huſband *de facto*; contrary to the general rule of law: becauſe he is no huſband *de jure*, in caſe the actual marriage was alſo againſt her will [p]. In caſes indeed where the actual marriage is good, by the conſent of the inveigled woman obtained after her forcible abduction, ſir Matthew Hale ſeems to queſtion how far her evidence ſhould be allowed: but other authorities [q] ſeem to agree, that it ſhould even then be admitted; eſteeming it abſurd, that the offender ſhould thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, ſhould (by a forced conſtruction of law) be made uſe of to ſtop the mouth of the moſt material witneſs againſt him.

An inferior degree of the ſame kind of offence, but not attended with force, is puniſhed by the ſtatute 4 & 5 Ph. & Mar. c. 8. which enacts, that if any perſon, above the age of fourteen, unlawfully ſhall convey or *take away any woman child unmarried*, (which is held [r] to extend to baſtards as well as to legitimate children,) within the age of ſixteen years, from the poſſeſſion and againſt the will of the father, mother, guardians, or governors, he ſhall be impriſoned two years, or fined at the diſcretion of the juſtices: and if he deflowers ſuch maid or woman child, or without the conſent of parents contracts matrimony with her, *he* ſhall be impriſoned five years, or fined at the diſcretion of the juſtices, and *ſhe* ſhall forfeit all her lands to her next of kin, during the life of her ſaid huſband. So that as theſe ſtolen marriages, under the age of ſixteen, were uſually upon mercenary views, this act, beſides puniſhing the ſeducer, wiſely removed the temptation. But this latter part of the act is now rendered

o 1 Hawk. P. C. 110.
p 1 Hal. P. C. 661.
q Cro. Car. 488. 3 Keb. 193. State Trials. V. 455.
r Stra. 1162.

almost useless, by provisions of a very different kind, which make the marriage totally void [s], in the statute 26 Geo. II. c. 33.

III. A THIRD offence, against the female part also of his majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of *rape, raptus mulierum*, or the carnal knowlege of a woman forcibly and against her will. This, by the Jewish law [t], was punished with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the mosaic law.

THE civil law [u] punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke: and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit* "*perpetratum.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman law supposes never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si* "*enim ipsi raptores metu, vel atrocitate poenae, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti,* "*peccandi locus relinquetur; quia hoc ipsum* velle *mulierum, ab* "*insidiis nequissimi hominis, qui meditatur rapinam, inducitur.*

s See Vol. I. p. 437, &c.

t Deut. xxii. 25.

u *Cod.* 9. *tit.* 13.

"*Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit,* "*non faciet eam velle in tantum dedecus sese prodere.*" But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

RAPE was punished by the Saxon laws, particularly those of king Athelstan [w], with death: which was also agreeable to the old Gothic or Scandinavian constitution [x]. But this was afterwards thought too hard: and in it's stead another severe, but not capital, punishment, was inflicted by William the conqueror; *viz.* castration, and loss of eyes [y]; which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law, (and, it seems, still continues to be so in appeals of rape [z]) that the woman should immediately after, "*dum recens fuerit maleficium,*" go to the next town, and there make discovery to some credible persons of the injury she has suffered: and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage [a]. This seems to correspond in some degree with the laws of Scotland and Arragon [b], which require that complaint must be made within twenty-four hours: though afterwards by statute Westm. 1. c. 13. the time of limitation in England was extended to forty days. At present there is no time of limitation fixed: for, as it is usually now punished by indictment at the suit of the king, the maxim of law takes place, that *nullum tempus occurrit regi:* but the jury will rarely give credit to a stale complaint. During the former period also it was held for law [c], that the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the exchange, but not otherwise.

w Bracton. *l.* 3. *c.* 28.
x Stiernh. *de jure Sueon.* *l.* 3. *c.* 2.
y *LL. Guil. Conqu. c.* 19.
z 1 Hal. P. C. 632.
a Glanv. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.
b Barrington. 142.
c Glanv. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.

In the 3 Edw. I. by the ſtatute Weſtm. 1. c. 13. the puniſhment of rape was much mitigated: the offence itſelf, of raviſhing a damſel within age, (that is, *twelve* years old) either with her conſent or without, or of any other woman againſt her will, being reduced to a treſpaſs, if not proſecuted by appeal within forty days, and ſubjecting the offender only to two years imprisonment, and a fine at the king's will. But, this lenity being productive of the moſt terrible conſequences, it was in ten years afterwards, 13 Edw. I. found neceſſary to make the offence of forcible rape felony by ſtatute Weſtm. 2. c. 34. And by ſtatute 18 Eliz. c. 7. it is made felony without benefit of clergy: as is alſo the abominable wickedneſs of carnally knowing and abuſing any woman child under the age of ten years; in which caſe the conſent or non-conſent is immaterial, as by reaſon of her tender years ſhe is incapable of judgment and diſcretion. Sir Matthew Hale is indeed of opinion, that ſuch profligate actions committed on an infant under the age of *twelve* years, the age of female diſcretion by the common law, either with or without conſent, amount to rape and felony; as well ſince as before the ſtatute of queen Elizabeth[d]: but that law has in general been held only to extend to infants under *ten*; though it ſhould ſeem that damſels between *ten* and *twelve* are ſtill under the protection of the ſtatute Weſtm. 1. the law with reſpect to their ſeduction not having been altered by either of the ſubſequent ſtatutes.

A MALE infant, under the age of fourteen years, is preſumed by law incapable to commit a rape, and therefore it ſeems cannot be found guilty of it. For though in other felonies *malitia ſupplet aetatem*, as has in ſome caſes been ſhewn; yet, as to this particular ſpecies of felony, the law ſuppoſes an imbecillity of body as well as mind[e].

THE civil law ſeems to ſuppoſe a proſtitute or common harlot incapable of any injuries of this kind[f]: not allowing

[d] 1 Hal. P. C. 631.

[e] *Ibid.*

[f] *Cod.* 9. 9. 22. *Ff.* 47. 2. 39.

any

any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life[g]: for, as Bracton well observes[h], "*licet meretrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiae ejus consentire noluit.*"

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall therefore merely add upon this head a few remarks from sir Matthew Hale; with regard to the competency and credibility of witnesses; which may, *salvo pudore*, be considered.

AND, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance; if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might

g 1 Hal. P. C. 629. 1 Hawk. P. C. 108. h *fol.* 147.

have

have been heard, and she made no outcry: these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.

MOREOVER, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lye. Nay, though she hath not, it is thought by sir Matthew Hale[i] that she ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled, [Brazier's case, before the twelve judges, P. 19 Geo. III.] that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

"IT is true, says this learned judge[j], that rape is a most "detestable crime, and therefore ought severely and impar-

i 1 Hal. P. C. 634. j *Ibid.* 635.

"tially

"tially to be punished with death; but it must be remembered, that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation; and concludes thus; "I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are overhastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses."

IV. WHAT has been here observed, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous *crime against nature*, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I WILL not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in it's very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*[k]." A taciturnity observed likewise by the edict of Constantius and Constans[l]; "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari*

[k] See in *Rot. Parl.* 50 Edw. III. *n.* 58. a complaint, that a Lombard did commit the sin "that was not to be named." (12 Rep. 37.)

[l] *Cod.* 9. 9. 31.

"*jura*

"*jura gladio ultore, ut exquisitis poenis subdantur infames, qui* "*sunt, vel qui futuri sunt rei.*" Which leads me to add a word concerning it's punishment.

THIS the voice of nature and of reason, and the express law of God [m], determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our antient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death [n]; though Fleta [o] says they should be buried alive: either of which punishments was indifferently used for this crime among the antient Goths [p]. But now the general punishment of all felonies is the same, namely, by hanging: and this offence (being in the times of popery only subject to ecclesiastical censures) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6. revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari poena plectantur* [q].

THESE are all the felonious offences more immediately against the personal security of the subject. The inferior offences, or misdemesnors, that fall under this head, are *assaults*, *batteries*, *wounding*, *false imprisonment*, and *kidnapping*.

V, VI, VII. WITH regard to the nature of the three first of these offences in general, I have nothing farther to add to what has already been observed in the preceding book of these commentaries [r]; when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed

[m] Levit. xx. 13. 15.
[n] Brit. *c.* 9.
[o] *l.* 1. *c.* 37.
[p] Stiernh. *de jure Goth.* *l.* 3. *c.* 2.
[q] 3 Inst. 59.
[r] See Vol. III. pag. 120.

with

with any very atrocious design [s]. As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual, than for the absolute perpetration of the facts themselves, on account of the difficulty of proof: or, when both parties are consenting to an unnatural attempt, it is usual not to charge any *assault;* but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer, the commission of the abominable crime beforementioned. And, in all these cases, besides heavy fine and imprisonment, it is usual to award judgment of the pillory.

THERE is also one species of battery, more atrocious and penal than the rest, which is the beating of a clerk in orders, or clergyman; on account of the respect and reverence due to his sacred character, as the minister and embassador of peace. Accordingly it is enacted by the statute called *articuli cleri,* 9 Edw. II. c. 3. that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king; that is by indictment in the king's courts: and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which if the offender will redeem by money, to be given to the bishop, or the party grieved, it may be sued for before the bishop; whereas otherwise to sue in any spiritual court, for civil damages for the battery, falls within the danger of *praemunire* [t]. But suits are, and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance [u]. So that upon the whole it appears, that a person guilty of such brutal behaviour to a clergyman, is subject to three kinds of prosecution, all of which may be pursued for one and the same offence: an indictment, for the breach of the king's peace by such assault and battery; a civil action, for the special damage sustained by the party injured; and a suit in the ecclesiastical court, first, *pro correctione et salute*

[s] 1 Hawk. P. C. 65.

[t] 2 Inst. 492. 620.

[u] *Artic. Cler.* 9 *Edw. II. c.* 4. F.N.B. 53.

animae

animae by *enjoining* penance, and then again for such sum of money as shall be agreed on for *taking off* the penance enjoined: it being usual in those courts to exchange their spiritual censures for a round compensation in money [v]; perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animae*.

VIII. THE two remaining crimes and offences, against the persons of his majesty's subjects, are infringements of their natural liberty: concerning the first of which, *false imprisonment*, it's nature and incidents, I must content myself with referring the student to what was observed in the preceding volume [w], when we considered it as a mere civil injury. But, besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of it's members, and for the infringement of the good order of society. We have seen before [x] that the most atrocious degree of this offence, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *praemunire*, and incapacity to hold any office, without any possibility of pardon [y]. And we may also add, that by statute 43 Eliz. c. 13. to carry any one by force out of the four northern counties, or imprison him within the same, in order to ransom him or make spoil of his person or goods, is felony without benefit of clergy in the principals and all accessories before the fact. Inferior degrees of the same offence, of false imprisonment, are also punishable by indictment, (like assaults and batteries) and the delinquent may be fined and imprisoned [z]. And indeed [a] there can be no doubt, but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemesnors whatsoever, of a notoriously evil example, may be indicted at the suit of the king.

v 2 Roll. Rep. 384.
w See Vol. III. pag. 127.
x See pag. 116.
y Stat. 31 Car. II. c. 2.
z West. Symbol. part 2. pag. 92.
a 1 Hawk. P. C. 210.

IX. THE other remaining offence, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another, was capital by the Jewish law. "He that stealeth "a man, and selleth him, or if he be found in his hand, he "shall surely be put to death[b]." So likewise in the civil law, the offence of spiriting away and stealing men and children; which was called *plagium*, and the offender *plagiarii*, was punished with death[c]. This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in it's consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory[d]. And also the statute 11 & 12 W. III. c. 7. though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months imprisonment. And thus much for offences that more immediately affect the *persons* of individuals.

[b] Exod. xxi. 16.
[c] *Ff.* 48. 15. 1.
[d] Raym. 474. 2 Show. 221. Skin. 47. Comb. 10.

2. As to what ſhall be ſaid to be a *burning*, ſo as to amount to arſon a bare intent, or attempt to do it, by actually ſetting fire to an houſe, unleſs it abſolutely *burns*, does not fall within the deſcription of *incendit et combuſſit;* which were words neceſſary, in the days of law-latin, to all indictments of this ſort. But the burning and conſuming of any part is ſufficient; though the fire be afterwards extinguiſhed[h]. Alſo it muſt be a *malicious* burning; otherwiſe it is only a treſpaſs: and therefore no negligence or miſchance amounts to it. For which reaſon, though an unqualified perſon, by ſhooting with a gun, happens to ſet fire to the thatch of a houſe, this ſir Matthew Hale determines not to be felony, contrary to the opinion of former writers[i]. But by ſtatute 6 Ann. c. 31. any ſervant, negligently ſetting fire to a houſe or outhouſes, ſhall forfeit 100 *l*, or be ſent to the houſe of correction for eighteen months: in the ſame manner as the Roman law directed "*eos, qui negligenter ignes apud ſe habuerint, fuſtibus* "*vel flagellis caedi*[k]."

3. THE *puniſhment* of arſon was death by our antient Saxon laws[l]. And, in the reign of Edward the firſt, this ſentence was executed by a kind of *lex talionis;* for the incendiaries were burnt to death[m]: as they were alſo by the Gothic conſtitutions[n]. The ſtatute 8 Hen. VI. c. 6. made the wilful burning of houſes, under ſome ſpecial circumſtances therein mentioned, amount to the crime of high treaſon. But it was again reduced to felony by the general acts of Edward VI and queen Mary; and now the puniſhment of all capital felonies is uniform, namely, by hanging. The offence of arſon was denied the benefit of clergy by ſtatute 21 Hen. VIII. c. 1. but that ſtatute was repealed by 1 Edw. VI. c. 12. and arſon was afterwards held to be ouſted of clergy, with reſpect to the principal offender, only by inference and deduction from the ſtatute 4 & 5 P. & M. c. 4.

h 1 Hawk. P. C. 106.
i 1 Hal. P. C. 569.
k *Ff. l.* 15. 4.
l *LL. Inae. c.* 7.
m Britt. c. 9.
n Stiernh. *de jure Goth. l.* 3. *c.* 6.

which

which exprefsly denied it to the acceffory before the fact[o]; though now it is exprefsly denied to the principal in all cafes within the ftatute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal houfebreaking, *burgi latrocinium*, which by our antient law was called *hamefecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only becaufe of the abundant terror that it natnaally carries with it, but alfo as it is a forcible invafion and difturbance of that right of habitation, which every individual might acquire even in a ftate of nature; an invafion, which in fuch a ftate would be fure to be punifhed with death, unlefs the affailant were the ftronger. But in civil fociety, the laws alfo come in to the affiftance of the weaker party: and, befides that they leave him this natural right of killing the aggreffor, if he can, (as was fhewn in a former chapter[p]) they alfo protect and avenge him, in cafe the might of the affailant is too powerful. And the law of England has fo particular and tender a regard to the immunity of a man's houfe, that it ftiles it his caftle, and will never fuffer it to be violated with impunity: agreeing herein with the fentiments of antient Rome, as expreffed in the words of Tully[q]; "*quid enim fanctius, quid omni religione* "*munitius, quam domus uniufcujufque civium?*" For this reafon no outward doors can in general be broken open to execute any civil procefs; though, in criminal caufes, the public fafety fuperfedes the private. Hence alfo in part arifes the animadverfion of the law upon eaves-droppers, nufancers, and incendaries: and to this principle it muft be affigned, that a man may affemble people together lawfully (at leaft if they do not exceed eleven) without danger of raifing a riot, rout, or unlawful affembly, in order to protect and defend his houfe; which he is not permitted to do in any other cafe[r].

[o] 11 Rep. 35. 2 Hal. P. C. 346, 347. Fofter. 336.

[p] See pag. 180.

[q] *pro domo*, 41.

[r] 1 Hal. P. C. 547.

THE definition of a burglar, as given us by sir Edward Coke[s], is, "he that by night breaketh and entereth into a "mansion-house, with intent to commit a felony." In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

1. THE *time* must be by night, and not by day: for in the day time there is no burglary. We have seen[t], in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: antiently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary[u]. But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from it's being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

As to the *place*. It must be, according to sir Edward Coke's definition, in a *mansion* house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei*[v]. But it does not seem absolutely necessary, that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night[w]; though that perhaps sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be "*nocturna diruptio alicujus*

s 3 Inst. 63.

t See pag. 180, 181.

u 3 Inst. 63. 1 Hal. P. C. 350. 1 Hawk. P. C. 101.

v 3 Inst. 64.

w Spelm. *Gloss. t. Burglary*. 1 Hawk. P. C. 103.

"*habitaculi, vel ecclesiae, etiam murorum portarumve burgi, ad* "*feloniam perpetrandam.*" And therefore we may safely conclude, that the requisite of it's being *domus mansionalis* is only in the burglary of a private house: which is the most frequent, and in which it is indispensably necessary to form it's guilt, that it must be in a mansion or dwelling house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary; though no one be in it, at the time of the fact committed [x]. And if the barn, stable, or warehouse, be parcel of the mansion-house and within the same common fence [y], though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all it's branches and appurtenants, if within the curtilage or home-stall [z]. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion house of the owner [a]. So also is a room or lodging, in any private house, the mansion for the time being of the lodger; if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But, if the owner himself lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling house of the owner [b]. Thus too the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers [c]. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwelling-house, nor can burglary be committed therein; for by the

x 1 Hal. P. C. 566. Fost. 77.

y *Kev. Garland.* P. 16 Geo. III. by all the judges.

z 1 Hal. P. C. 558. 1 Hawk. P. C. 104.

a 1 Hal. P. C. 556.

b Kel. 84. 1 Hal. P. C. 556.

c Foster. 38, 39.

leafe it is fevered from the reft of the houfe, and therefore is not the dwelling-houfe of him who occupies the other part; neither can I be faid to dwell therein, when I never lie there[d]. Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein[e]: for the law regards thus highly nothing but permanent edifices; a houfe, or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in fo fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the fame circumftances.

3. As to the *manner* of committing burglary: there muft be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the fame breakers enter the next night through the fame, they are burglars[f]. There muft in general be an actual breaking; not a mere legal *claufum fregit*, (by leaping over invifible ideal boundaries, which may conftitute a civil trefpafs) but a fubftantial and forcible irruption. As at leaft by breaking, or taking out the glafs of, or otherwife opening, a window: picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloofing any other faftening which the owner has provided. But if a perfon leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is fo[g]. But to come down a chimney is held a burglarious entry; for that is as much clofed, as the nature of things will permit[h]. So alfo to knock at a door, and upon opening it to rufh in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a conftable to gain admittance, in order to fearch for traitors, and then to bind the conftable and rob the houfe; all thefe entries have been adjudged burglarious, though there was

d 1 Hal. P. C. 558.

e 1 Hawk. P. C. 104.

f 1 Hal. P. C. 551.

g *Ibid.* 553.

h 1 Hawk. P. C. 102. 1 Hal. P. C. 552.

no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloke of legal process[i]. And so, if a servant opens and enters his master's chamber door with a felonious design: or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both[k]: for the servant is doing an unlawful act, and the opportunity afforded him, of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries[l]. The entry may be before the breaking, as well as after: for by statute 12 Ann. c. 7. if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or, being in such house, shall commit any felony; and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon[m] holding the affirmative, and sir Matthew Hale[n] the negative. But it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

4. As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a

i 1 Hawk. P. C. 102.
k Stra. 881. 1 Hal. P. C. 553.
1 Hawk. P. C. 103.
l 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Fost. 108.
m Elem. 65.
n 1 Hal. P. C. 554.

robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute; since that statute, which makes an offence felony, gives it incidentally all the properties of a felony at common law [o].

THUS much for the nature of burglary; which is a felony at common law, but within the benefit of clergy. The statutes however of 1 Edw. VI. c. 12. and 18 Eliz. c. 7. take away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all abettors and accessories before the fact [p]. And, in like manner, the laws of Athens, which punished no simple theft with death, made burglary a capital crime [q].

[o] 1 Hawk. P. C. 105.

[p] Burglary in any house belonging to the plate glass company, with intent to steal the stock or utensils, is by statute 13 Geo. III. c. 38. declared to be single felony, and punished with transportation for seven years.

[q] Pott. Antiq. b. 1. c. 26.

CHAPTER THE SEVENTEENTH.

OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next, and laſt, ſpecies of offences againſt private ſubjects, are ſuch as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larciny*, and *malicious miſchief*: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of *forgery*. Of theſe three in their order.

I. LARCINY, or *theft*, by contraction for latrociny, *latrocinium*, is diſtinguiſhed by the law into two ſorts; the one called *ſimple* larciny, or plain theft unaccompanied with any other atrocious circumſtance; and *mixed* or *compound* larciny, which alſo includes it in the aggravation of a taking from one's houſe or perſon.

AND, firſt, of *ſimple* larciny: which, when it is the ſtealing of goods above the value of twelvepence, is called *grand* larciny; when of goods to that value, or under, is *petit* larciny: offences, which are conſiderably diſtinguiſhed in their puniſhment, but not otherwiſe. I ſhall therefore firſt conſider the nature of ſimple larciny in general; and then ſhall obſerve the different degrees of puniſhment inflicted on it's two ſeveral branches.

SIMPLE larciny then is "the felonious taking, and carrying away, of the perſonal goods of another." This offence

fence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were eſtabliſhed. How far ſuch an offence can exiſt in a ſtate of nature, where all things are held to be common, is a queſtion that may be ſolved with very little difficulty. The diſturbance of any individual, in the occupation of what he has ſeiſed to his preſent uſe, ſeems to be the only offence of this kind incident to ſuch a ſtate. But, unqueſtionably, in ſocial communities, when property is eſtabliſhed, the neceſſity whereof we have formerly ſeen [a], any violation of that property is ſubject to be puniſhed by the laws of ſociety: though how far that puniſhment ſhould extend, is matter of conſiderable doubt. At preſent we will examine the nature of theft, or larciny, as laid down in the foregoing definition.

1. It muſt be a *taking*. This implies the conſent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon truſt, can ground a larciny. As if A lends B a horſe, and he rides away with him; or, if I ſend goods by a carrier, and he carries them away; theſe are no larcenies [b]. But if the carrier opens a bale or pack of goods, or pierces a veſſel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, theſe are larcinies [c]: for here the *animus furandi* is manifeſt; ſince in the firſt caſe he had otherwiſe no inducement to open the goods, and in the ſecond the truſt was determined, the delivery having taken it's effect. But bare non-delivery ſhall not of courſe be intended to ariſe from a felonious deſign; ſince that may happen from a variety of other accidents. Neither by the common law was it larciny in any ſervant to run away with the goods committed to him to keep, but only a breach of civil truſt. But by ſtatute 33 Hen. VI. c. 1. the ſervants of perſons deceaſed, accuſed of embezzling their maſter's goods, may by writ out of chancery (iſſued by the advice of

[a] See Vol. II. pag. 8, &c.

[b] 1 Hal. P. C. 504.

[c] 3 Inſt. 107.

the chief justices and chief baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the court of king's bench, to answer their master's executors in any civil suit for such goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII. c. 7. if any servant embezzles his master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old. But if he had not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them is felony at common law [d]. So if a guest robs his inn or tavern of a piece of plate, it is larciny; for he hath not the possession delivered to him, but merely the use [e], and so it is declared to be by statute 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready furnished lodgings. Under some circumstances also a man may be guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with intent to charge the hundred with the loss according to the statute of Winchester [f].

2. THERE must not only be a taking, but a *carrying away*: *cepit et asportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away, to constitute a larciny [g]. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprized before he can make his escape with it; this is larciny [h].

d 1 Hal. P. C. 506.
e 1 Hawk. P. C, 90.
f Foster. 123, 124.
g 3 Inst. 108, 109.
h 1 Hawk. P. C. 93.

3. THIS

3. THIS taking, and carrying away, muſt alſo be *felonious;* that is, done *animo furandi:* or, as the civil law expreſſes it, *lucri cauſa* [i]. This requiſite, beſides excuſing thoſe who labour under incapacities of mind or will, (of whom we ſpoke ſufficiently at the entrance of this book [k]) indemnifies alſo mere treſpaſſers, and other petty offenders. As if a ſervant takes his maſter's horſe, without his knowlege, and brings him home again: if a neighbour takes another's plough, that is left in the field, and uſes it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I diſtrein another's cattle, or ſeiſe them: all theſe are miſdemeſnors and treſpaſſes, but no felonies [l]. The ordinary diſcovery of a felonious intent is where the party doth it clandeſtinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in caſes that may amount to larciny the variety of circumſtances is ſo great, and the complications thereof ſo mingled, that it is impoſſible to recount all thoſe, which may evidence a felonious intent, or *animum furandi:* wherefore they muſt be left to the due and attentive conſideration of the court and jury.

4. THIS felonious taking and carrying away muſt be *of the perſonal goods of another:* for if they are things *real*, or favour of the reality, larciny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewiſe that adhere to the freehold, as corn, graſs, trees, and the like, or lead upon a houſe, no larciny could be committed by the rules of the common law; but the ſeverance of them was, and in many things is ſtill, merely a treſpaſs which depended on a ſubtilty in the legal notions of our anceſtors. Theſe things were parcel of the real eſtate; and therefore, while they continued ſo, could not by any poſſibility be the ſubject of theft, being abſolutely fixed and immoveable [m]. And if they were

i Inſt. 4. 1. 1.

k See pag. 20.

l 1 Hal. P. C. 509.

m See Vol. II. p. 16.

ſevered

ſevered by violence, ſo as to be changed into moveables; and at the ſame time, by one and the ſame continued act, carried off by the perſon who ſevered them; they could never be ſaid to be taken *from* the *proprietor*, in this their newly acquired ſtate of mobility, (which is eſſential to the nature of larciny) being never, as ſuch, in the actual or conſtructive poſſeſſion of any one, but of him who committed the treſpaſs. He could not in ſtrictneſs be ſaid to have taken what at that time were the perſonal goods of another, ſince the very act of taking was what turned them into perſonal goods. But if the thief ſevers them at *one* time, whereby the treſpaſs is completed, and they are converted into perſonal chattels, in the conſtructive poſſeſſion of him on whoſe ſoil they are left or laid; and comes again at *another* time, when they are ſo turned into perſonalty, and takes them away; it is larciny: and ſo it is, if the owner, or any one elſe, has ſevered them [n]. And now, by the ſtatute 4 Geo. II. c. 32. to ſteal, or rip, cut, or break, with intent to ſteal, any lead, or iron bar, rail, gate, or paliſado, fixed to a dwelling-houſe or out-houſe, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to tranſportation for ſeven years; and to ſteal, damage, or deſtroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to ſteal or otherwiſe deſtroy any turnips, potatoes, cabbages, parſnips, peaſe, or carrots, or the roots of madder when growing, are [o] puniſhable criminally, by whipping, ſmall fines, impriſonment, and ſatisfaction to the party wronged, according to the nature of the offence. Moreover, the ſtealing by night of any trees, or of any roots, ſhrubs, or plants to the value of 5 *s*, is by ſtatute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchaſers thereof knowing the ſame to be ſtolen: and by ſtatutes 6 Geo. III. c. 48. and 13 Geo. III. c. 33. the ſtealing of any timber trees therein ſpecified [p], and of any root,

[n] 3 Inſt. 109. 1 Hal. P. C. 510.

[o] Stat. 43 Eliz. c. 7. 15 Car. II. c. 2. 31 Geo. II. c. 35. 6 Geo. III. c. 48. 9 Geo. III. c. 41. 13 Geo. III. c. 32.

[p] Oak, beech, cheſnut, walnut, aſh, elm, cedar, fir, aſp, lime, ſycamore, birch, poplar, alder, larch, maple, and hornbeam.

ſhrub,

ſhrub, or plant, by day, or night, is liable to pecuniary penalties for the two firſt offences, and for the third is conſtituted a felony liable to tranſportation for ſeven years. Stealing ore out of mines is alſo no larciny, upon the ſame principle of adherence to the freehold; with an exception only to mines of black lead, the ſtealing of ore out of which, or entering the ſame with intent to ſteal, is felony, puniſhable with impriſonment and whipping, or tranſportation not exceeding ſeven years; and to eſcape from ſuch impriſonment, or return from ſuch tranſportation, is felony without benefit of clergy; by ſtatute 25 Geo. II. c. 10. Upon nearly the ſame principle the ſtealing of writings relating to a real eſtate is no felony, but a treſpaſs [q]: becauſe they concern the land, or (according to our technical language) *ſavour* of the *realty*, and are conſidered as part of it by the law; ſo that they deſcend to the heir together with the land which they concern [r].

BONDS, bills, and notes, which concern mere *choſes in action*, were alſo at the common law held not to be ſuch goods whereof larciny might be committed; being of no intrinſic value [ſ], and not importing any property in *poſſeſſion* of the perſon from whom they are taken. But by the ſtatute 2 Geo. II. c. 25. they are now put upon the ſame footing, with reſpect to larcinies, as the money they were meant to ſecure. By ſtatute 15 Geo. II. c. 13. officers or ſervants of the bank of England, ſecreting or embezzling any note, bill, warrant, bond, deed, ſecurity, money, or effects, intruſted with them or with the company, are guilty of felony without benefit of clergy. The ſame is enacted by ſtatute 24 Geo. II. c. 11. with reſpect to officers and ſervants of the ſouth-ſea company. And, by ſtatute 7 Geo. III. c. 50. if any officer or ſervant of the poſt-office ſhall ſecrete, embezzle, or deſtroy any letter or pacquet, containing any bank note or other valuable paper particularly ſpecified in the act, or ſhall ſteal the ſame out of any letter or pacquet, he ſhall be guilty of felony without benefit of clergy. Or, if he ſhall deſtroy any letter or pac-

[q] 1 Hal. P. C. 510. Stra. 1137.
[r] See Vol. II. pag. 438.
[ſ] 8 Rep. 33.

quet with which he has received money for the poſtage, or ſhall advance the rate of poſtage on any letter or pacquet ſent by the poſt, and ſhall ſecrete the money received by ſuch advancement, he ſhall be guilty of ſingle felony. Larciny alſo could not at common law be committed of treaſure-trove, or wreck, till ſeized by the king or him who hath the franchiſe: for till ſuch ſeiſure no one hath a determinate property therein. But by ſtatute 26 Geo. II. c. 19. plundering or ſtealing from any ſhip in diſtreſs (whether wreck or no wreck) is felony without benefit of clergy: in like manner, as, by the civil law[s], this inhumanity is puniſhed in the ſame degree as the moſt atrocious theft.

LARCINY alſo cannot be committed of ſuch animals, in which there is no property either abſolute or qualified; as of beaſts that are *ferae naturae*, and unreclaimed, ſuch as deer, hares, and conies, in a foreſt, chace, or warren; fiſh, in an open river or pond; or wild fowls at their natural liberty[t]. But if they are reclaimed or confined, and may ſerve for food, it is otherwiſe, even at common law: for of deer ſo incloſed in a park that they may be taken at pleaſure, fiſh in a trunk, and pheaſants or partridges in a mew, larciny may be committed[u]. And now, by ſtatute 9 Geo. I. c. 22. to hunt, wound, kill, or ſteal any deer; to rob a warren; or to ſteal fiſh from a river or pond; (being in theſe caſes armed and diſguiſed) alſo to hunt, wound, kill, or ſteal any deer, in the king's foreſts or chaſes incloſed, or in any other incloſed place where deer have been uſually kept; or by gift or promiſe of reward to procure any perſon to join them in ſuch unlawful act; all theſe are felonies without benefit of clergy. And the ſtatute 16 Geo. III. c. 30. enacts, that every unauthorized perſon, his aiders and abettors, who ſhall courſe, hunt, ſhoot at, or otherwiſe attempt to kill, wound, or deſtroy any red or fallow deer in *any* foreſt, chaſe, purlieu, or antient walk, or in any *incloſed* park, paddock, wood, or other ground,

[s] *Cod.* 6. 2. 18.

[t] 1 Hal. P. C. 511. *Foſt.* 366.

[u] 1 Hawk. P. C. 94. 1 Hal. P. C. 511.

where deer are usually kept, shall forfeit the sum of 20 *l*, or for every deer actually killed, wounded, destroyed, taken in any toyl or snare, or carried away, the sum of 30 *l*, or double those sums in case the offender be a keeper: and, upon a second offence (whether of the same or a different species) shall be guilty of felony, and transportable for seven years. Which latter punishment is likewise inflicted on all persons armed with offensive weapons, who shall come into such places with an intent to commit any of the said offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. Also by statute 5 Geo. III. c. 14. the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard: and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies [v] by night in open warrens: and a forfeiture of five pounds, to the owner of the fishery, is made payable by persons taking or destroying (or *attempting* so to do) any fish in any river or other water within any inclosed ground, being private property. Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19. is also felony [w]. It is also said [x] that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But, of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitae naturae*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool [y], larciny may be committed; and also of the flesh of such as are either *domitae* or *ferae naturae*, when killed [z]. As to those

[v] See Stat. 22 & 23 Car. II. c. 25.

[w] 3 Inst. 98.

[x] Dalt. Just. c. 156.

[y] Dal. 21. Crompt. 36. 1 Hawk. P. C. 93. 1 Hal. P. C. 507. The King v. Martin, by all the judges. P. 17 Geo. III.

[z] 1 Hal. P. C. 511.

animals,

animals, which do not ſerve for food, and which therefore the law holds to have no intrinſic value, as dogs of all ſorts, and other creatures kept for whim and pleaſure, though a man may have a baſe property therein, and maintain a civil action for the loſs of them [z], yet they are not of ſuch eſtimation, as that the crime of ſtealing them amounts to larciny [a]. But by ſtatute 10 Geo. III. c. 18. very high pecuniary penalties, or a long impriſonment and whipping in their ſtead, may be inflicted by two juſtices of the peace, (with a very extraordinary mode of appeal to the quarter ſeſſions) on ſuch as ſteal, or knowingly harbour a ſtolen *dog*, or have in their cuſtody the ſkin of a dog that has been ſtolen [b].

NOTWITHSTANDING however that no larciny can be committed, unleſs there be ſome property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larciny to ſteal it; and an indictment will lie, for the goods of a perſon unknown [c]. In like manner as, among the Romans, the *lex Hoſtilia de furtis*, provided that a proſecution for theft might be carried on without the intervention of the owner [d]. This is the caſe of ſtealing a ſhroud out of a grave; which is the property of thoſe, whoever they were, that buried the deceaſed: but ſtealing the corpſe itſelf, which has no owner, (though a matter of great indecency) is no felony, unleſs ſome of the gravecloths be ſtolen with it [e]. Very different from the law of the Franks, which ſeems to have reſpected both as equal offences; when it directed that a perſon, who had dug a corpſe out of the ground in order to ſtrip it, ſhould be baniſhed from ſociety, and no one ſuffered to relieve his wants, till the relations of the deceaſed conſented to his readmiſſion [f].

HAVING thus conſidered the general nature of ſimple larciny, I come next to treat of it's *puniſhment*. Theft, by the Jewiſh law, was only puniſhed with a pecuniary fine, and ſatisfaction to the party injured [g]. And in the civil law, till

z See Vol. II. pag. 393.
a 1 Hal. P. C. 512.
b See the remarks in pag. 4. This ſtatute hath now continued ſixteen ſeſſions of parliament unrepealed!
c 1 Hal. P. C. 512.
d Gravin. *l*. 3. §. 106.
e See Vol. II. pag. 429.
f Monteſq. Sp. L. b. 30. ch. 19.
g Exod. c. xxii.

ſome very late conſtitutions, we never find the puniſhment capital. The laws of Draco at Athens puniſhed it with death: but his laws were ſaid to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And ſo the Attic laws in general continued[h]; except that once, in a time of dearth, it was made capital to break into a garden, and ſteal figs: but this law, and the informers againſt the offence, grew ſo odious, that from them all malicious informers were ſtyled ſycophants; a name which we have much perverted from it's original meaning. From theſe examples, as well as the reaſon of the thing, many learned and ſcrupulous men have queſtioned the propriety, if not lawfulneſs, of inflicting capital puniſhment for ſimple theft[i]. And certainly the natural puniſhment for injuries to property ſeems to be the loſs of the offender's own property: which ought to be univerſally the caſe, were all men's fortunes equal. But as thoſe, who have no property themſelves, are generally the moſt ready to attack the property of others, it has been found neceſſary inſtead of a pecuniary to ſubſtitute a corporal puniſhment; yet how far this corporal puniſhment ought to extend, is what has occaſioned the doubt. Sir Thomas More[j], and the marquis Beccaria[k], at the diſtance of more than two centuries from each other, have very ſenſibly propoſed that kind of corporal puniſhment, which approaches the neareſt to a pecuniary ſatisfaction; *viz.* a temporary impriſonment, with an obligation to labour, firſt for the party robbed, and afterwards for the public, in works of the moſt ſlaviſh kind: in order to oblige the offender to repair, by his induſtry and diligence, the depredations he has committed upon private property and public order. But notwithſtanding

h Petit. *LL. Attic. l. 7. tit. 5.*

i *Eſt enim ad vindicanda furta nimis atrox, nec tamen ad refraenanda ſufficiens: quippe neque furtum ſimplex tam ingens facinus eſt, ut capite debeat plecti; neque ulla poena eſt tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quaerendi victus habent.* (Mori *Utopia. edit. Glaſg.* 1750. *pag.* 21.)—*Denique, cum lex Moſaica, quanquam inclemens et aſpera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiae qua pater imperat filiis, majorem indulſiſſe nobis invicem ſaeviendi licentiam. Haec ſunt cur non licere putem: quam vero ſit abſurdum, atque etiam pernicioſum reipublicae, furem atque homicidam ex aeque puniri, nemo eſt (opinor) qui neſciat.* (*Ibid.* 39.)

j *Utop. pag.* 42.

k ch. 22.

all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital: and Puffendorf [l], together with sir Matthew Hale [m], are of opinion that this must always be referred to the prudence of the legislature; who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions [n]. Yet both these writers agree, that such punishment should be cautiously inflicted, and never without the utmost necessity.

OUR antient Saxon laws nominally punished theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle [o]. But in the ninth year of Henry the first, this power of redemption was taken away, and all persons guilty of larciny above the value of twelvepence were directed to be hanged; which law continues in force to this day [p]. For though the inferior species of theft, or petit larciny, is only punished by imprisonment or whipping at common law [q], or by statute 4 Geo. I. c. 11. may be extended to transportation for seven years, as is also expresly directed in the case of the plate-glass company [r], yet the punishment of grand larciny, or the stealing above the value of twelvepence, (which sum was the standard in the time of king Athelstan, eight hundred years ago) is at common law regularly death. Which, considering the great intermediate alteration [s] in the price of denomination of money, is undoubtedly a very rigorous constitution; and made sir Henry Spelman (above a century since, when money was at twice it's present rate) complain, that while every thing else was risen in it's nominal value, and become dearer, the life of man had continually

l L. of N. b. 8. c. 3.

m 1 Hal. P. C. 13.

n See pag. 9.

o Tac. *de mor. Germ. c.* 12.

p 1 Hal. P. C. 12. 3 Inst. 53.

q 3 Inst. 218.

r Stat. 13 Geo. III. c. 38.

s In the reign of king Henry I, the stated value at the exchequer, of a pasture fed ox was one shilling. (*Dial. de Scacc. l.* 1. §. 7.) which if we should even suppose to mean the *solidus legalis* mentioned by Lyndewode (*Prov. l.* 3. *c.* 13. See Vol. II. page 509.) or the 72d part of a pound of gold, is only equal to 13*s.* 4*d.* of the present standard.

 grown

grown cheaper[t]. It is true, that the mercy of juries will often make them strain a point, and bring in larciny to be under the value of twelvepence, when it is really of much greater value: but this, though evidently justifiable and proper, when it only reduces the present nominal value of money to the antient standard[u], is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge. It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larciny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death: but this is only for the first offence. And in many cases of simple larciny the benefit of clergy is taken away by statute: as from horsestealing in the principals, and accessories both *before* and *after* the fact[w]; theft by great and notorious thieves in Northumberland and Cumberland[x]; taking woollen cloth from off the tenters[y], or linens, fustians, callicoes, or cotton goods, from the place of manufacture[z]; (which extends, in the last case, to aiders, assisters, procurers, buyers, and receivers) feloniously driving away, or otherwise stealing one or more sheep or other cattle specified in the acts, or killing them with intent to steal the whole or any part of the carcase[a], or aiding or assisting therein; thefts on navigable rivers above the value of forty shillings[b], or being present, aiding, and assisting thereat; plundering vessels in

t *Gloss.* 350.

u 2 Inst. 189.

w Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Eliz. c. 12.

x Stat. 18 Car. II. c. 3.

y Stat. 22 Car. II. c. 5. But, as it sometimes is difficult to prove the identity of the goods so stolen, the *onus probandi* with respect to innocence is now by statute 15 Geo. II. c. 27. thrown on the persons in whose custody such goods are found: the failure whereof is, for the first time, a misdemesnor punishable by forfeiture of the treble value; for the second, by imprisonment also; and the third time it becomes a felony, punished with transportation for seven years.

z Stat. 18 Geo. II. c. 27. Note, in the three last cases an option is given to the judge to transport the offender; for *life* in the first case, for *seven years* in the second, and for *fourteen years* in the third;—in the first and third cases *instead of* sentence of death, in the second *after* sentence is given.

a Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34. See vol. I. pag. 88.

b Stat. 24 Geo. II. c. 45.

distress, or that have suffered shipwreck [c]; stealing letters sent by the post [d]; and also stealing deer, fish, hares, and conies under the peculiar circumstances mentioned in the Waltham black act [e]. Which additional severity is owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties men would otherwise lie under to preserve those goods, which are so easily carried off. Upon which last principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle [f]; and the *balnearii*, or such as stole the cloaths of persons who were washing in the public baths [g]; both which constitutions seem to be borrowed from the laws of Athens [h]. And so too the antient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left in the field: such kind of property (which no human industry can sufficiently guard) being esteemed under the peculiar custody of heaven [i]. And thus much for the offence of *simple* larciny.

MIXED, or *compound* larciny is such as has all the properties of the former, but is accompanied with either one, or both, of the aggravations of a taking from one's *house* or *person*. First therefore of larciny from the *house*, and then of larciny from the *person*.

1. LARCINY from the *house*, though it seems (from the considerations mentioned in the preceding chapter [j]) to have a higher degree of guilt than simple larciny, yet is not at all distinguished from the other at common law [k]: unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, *viz.* that of burglary. But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern writer [l], who hath shewn them to have gradually arisen from our improvements in trade and opulence)

c Stat. 12 Ann. st. 2. c. 18. 26 Geo. II. c. 19.
d Stat. 7 Geo. III. c. 50.
e Stat. 9 Geo. I. c. 22.
f *Ff.* 47. *t.* 14.
g *Ibid. t.* 17.
h Pott. Antiq. b. 1. c. 26.
i Stiernh. *de jur Goth. l.* 3. c. 5.
j See pag. 223.
k 1 Hawk. P. C. 98.
l Barr. 375, *&c.*

the benefit of clergy is taken from larcinies committed in an house in almost every instance; except that larciny of the stock or utensils of the plate-glass company from any of their houses, &c. is made only single felony, and liable to transportation for seven years [m]. The multiplicity of the general acts is apt to create some confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larciny; *viz.* First, in larcinies *above the value of twelvepence*, committed, 1. In a church or chapel, with or without violence, or breaking the same [n]: 2. In a booth or tent in a market or fair, in the day time or in the night, by violence or breaking the same; the owner or some of his family being therein [o]: 3. By robbing a dwelling-house in the day time (which *robbing* implies a breaking) any person being therein [p]: 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear [q]: which amounts in law to a robbery: and in both these last cases the accessory before the fact is also excluded from his clergy. Secondly, in larcinies *to the value of five shillings*, committed, 1. By breaking any dwelling-house, or any outhouse, shop, or warehouse thereunto belonging, in the day time, although no person be therein [r]; which also now extends to aiders, abettors, and accessories before the fact [s]: 2. By privately stealing goods, wares, or merchandize in any shop, warehouse [t], coachhouse or stable, by day or by night; though the same be not broken open, and though no person be therein [u]: which likewise extends to such as assist, hire, or command the offence to be committed. Lastly, in larcinies *to the value of forty shillings* in a dwelling-house, or its outhouses, although the same be not broken, and whether any person be therein or no; unless committed against their masters by apprentices under the age of fifteen [v]. This also extends to those, who aid or assist in the commission of any such offence.

m Stat. 13 Geo. III. c. 38.

n Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 1 Hal. P. C. 518.

o Stat. 5 & 6 Edw. VI. c. 9. 1 Hal. P. C. 522.

p Stat. 3 & 4 W. & M. c. 9.

q *Ibid.*

r Stat. 39 Eliz. c. 15.

s Stat. 3 & 4 W. & M. c. 9.

t See Foster. 78. Barr. 379.

u Stat. 10 & 11 W. III. c. 23.

v Stat. 12 Ann. stat. 1. c. 7.

2. LARCINY from the *person* is either by *privately* stealing; or by open and violent assault, which is usually called *robbery*.

THE offence of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowlege, was debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 4. But then it must be such a larciny, as stands in need of the benefit of clergy, *viz.* of above the value of twelvepence; else the offender shall not have judgment of death. For the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the antient law [w]. This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the queen's court and presence) at the time when this statute was made: besides that this is an infringement of property, in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature. And therefore the *saccularii*, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws [x].

OPEN and violent larciny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear [y]. 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony, so late as Henry the fourth's time [z]: but afterwards it was taken to be only a misdemesnor, and punishable with fine and imprisonment; till the

w 1 Hawk. P. C. 98. The like observation will certainly hold in the cases of horsestealing, (1 Hal. P. C. 531.) thefts in Northumberland and Cumberland, and stealing woollen cloth from the tenters; and possibly in such other cases where it is provided by any statute that simple larciny, under certain circumstances, shall be felony without benefit of clergy.

x *Ff.* 47. 11. 7. Pott. Antiq. l. 1. c. 26.

y 1 Hawk. P. C. 95.

z 1 Hal. P. C. 532.

ſtatute 7 Geo. II. c. 21. which makes it a felony (tranſportable for ſeven years) unlawfully and maliciouſly to aſſault another, with any offenſive weapon or inſtrument;—or by menaces, or by other forcible or violent manner, to demand any money or goods;—with a felonious intent to rob. If the thief, having once taken a purſe, returns it, ſtill it is a robbery: and ſo it is, whether the taking be ſtrictly from the perſon of another, or in his preſence only: as, where a robber by menaces and violence puts a man in fear, and drives away his ſheep or his cattle before his face[a]. But if the taking be not either directly from his perſon, or in his preſence, it is no robbery[b]. 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery[c]. 3. Laſtly, the taking muſt be by force, or a previous putting in fear; which makes the violation of the perſon more atrocious than privately ſtealing. For, according to the maxim of the civil law[d], "*qui vi rapuit, fur improbior eſſe videtur.*" This previous violence, or putting in fear, is the criterion that diſtinguiſhes robbery from other larcinies. For if one privately ſteals ſixpence from the perſon of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is ſubſequent[e]: neither is it capital, as privately ſtealing, being under the value of twelvepence. Not that it is indeed neceſſary, though uſual, to lay in the indictment that the robbery was committed by *putting in fear*; it is ſufficient, if laid to be done by *violence*[f]. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that ſo much force, or threatening by word or geſture, be uſed, as might create an apprehenſion of danger, or induce a man to part with his property without or againſt his conſent[g]. Thus, if a man be knocked down without previous warning, and ſtripped of his property while ſenſeleſs, though ſtrictly he cannot be ſaid to be *put in fear*, yet this is un-

a 1 Hal. P. C. 533.
b Comyns. 478. Stra. 1015.
c 1 Hawk. P. C. 97.
d *Ff.* 4. 2. 14. §. 12.
e 1 Hal. P. C. 534.
f Trin. 3 Ann. by all the judges.
g Foſt. 128.

doubtedly

doubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery[h]. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted[i], whether the forcing a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.

This species of larciny is debarred of the benefit of clergy by statute 23 Hen. VIII. c. 1. and other subsequent statutes; not indeed in general, but only when committed in a dwelling-house, or in or near the king's highway. A robbery therefore in a distant field, or foot-path, was not punished with death[k]; but was open to the benefit of clergy, till the statute 3 & 4 W. & M. c. 9. which takes away clergy from both principals and accessories before the fact, in robbery, wheresoever committed.

II. Malicious *mischief*, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak, excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

And, first, by statute 22 Hen. VIII. c. 11. perversely and maliciously to cut down or destroy the powdike, in the fens of Norfolk and Ely, is felony. And in like manner it is by many special statutes, enacted upon the occasions, made felony to destroy the several sea-banks, river-banks, public navigations, and bridges, erected by virtue of those acts of

h 1 Hawk. P. C. 96.
i *Ibid.* 97.
k 1 Hal. P. C. 535.

parliament.

parliament. By ſtatute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to burn any barn or ſtack of corn or grain; or to impriſon or carry away any ſubject, in order to ranſom him, or to make prey or ſpoil of his perſon or goods upon deadly feud or otherwiſe, in the four northern counties of Northumberland, Weſtmorland, Cumberland, and Durham, or being acceſſory before the fact to ſuch carrying away or impriſonment; or to give or take any money or contribution, there called *blackmail*, to ſecure ſuch goods from rapine; is felony without benefit of clergy. By ſtatute 22 & 23 Car. II. c. 7. maliciouſly, unlawfully, and willingly, in the night-time, to burn or cauſe to be burnt or deſtroyed, any ricks or ſtacks of corn, hay, or grain, barns, houſes, buildings, or kilns; or to kill any horſes, ſheep, or other cattle, is felony; but the offender may make his election to be tranſported for ſeven years; and to maim or hurt ſuch horſes, ſheep, or other cattle, is a treſpaſs, for which treble damages ſhall be recovered. By ſtatute 4 & 5 W. & M. c. 23. to burn on any waſte, between Candlemas and Midſummer, any grig, ling, heath, furze, goſs, or fern, is puniſhable with whipping and confinement in the houſe of correction. By ſtatute 1 Ann. ſt. 2. c. 9. captains and mariners belonging to ſhips, and deſtroying the ſame, to the prejudice of the owners, (and by 4 Geo. I. c. 12. to the prejudice of inſurers alſo) are guilty of felony without benefit of clergy. And by ſtatute 12 Ann. ſt. 2. c. 18. making any hole in a ſhip in diſtreſs, or ſtealing her pumps, or aiding or abetting ſuch offence, or wilfully doing any thing tending to the immediate loſs of ſuch ſhip, is felony without benefit of clergy. By ſtatute 1 Geo. I. c. 48. maliciouſly to ſet on fire any underwood, wood, or coppice, is made ſingle felony. By ſtatute 6 Geo. I. c. 23. the wilful and malicious tearing, cutting, ſpoiling, burning, or defacing of the garments or cloaths of any perſon paſſing in the ſtreets or highways, with intent ſo to do, is felony. This was occaſioned by the inſolence of certain weavers and others: who, upon the introduction of ſome Indian faſhions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or caſting *aqua fortis* in the

ſtreets upon ſuch as wore them. By ſtatute 9 Geo. I. c. 22. commonly called the Waltham black-act, occaſioned by the devaſtations committed near Waltham in Hampſhire, by perſons in diſguiſe or with their faces blacked; (who ſeem to have reſembled the Roberdſmen, or followers of Robert Hood, that in the reign of Richard the firſt committed great outrages on the borders of England and Scotland [l];) by this black act, I ſay, which has in part been mentioned under the ſeveral heads of riots, menaces, mayhem, and larciny [m], it is farther enacted, that to ſet fire to any houſe, barn or outhouſe, (which is extended by ſtatute 9 Geo. III. c. 29. to the malicious and wilful burning or ſetting fire to all kinds of mills) or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood; or unlawfully and maliciouſly to break down the head of any fiſhpond, whereby the fiſh ſhall be loſt or deſtroyed; or in like manner to kill, maim, or wound any cattle; or cut down or deſtroy, any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, ſhelter, or profit; all theſe malicious acts, or procuring by gift or promiſe of reward any perſon to join them therein, are felonies, without benefit of clergy: and the hundred ſhall be chargeable for the damages, unleſs the offender be convicted. In like manner by the Roman law, to cut down trees, and eſpecially vines, was puniſhed in the ſame degree as robbery [n]. By ſtatutes 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is alſo made felony without the benefit of clergy, maliciouſly to cut down any river or ſea-bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops, or wilfully and maliciouſly to ſet on fire, or cauſe to be ſet on fire, any mine, pit, or delph of coal. By ſtatute 11 Geo. II. c. 22. to uſe any violence in order to deter any perſon from buying corn or grain; to ſeize any carriage or horſe carrying grain or meal to or from any market or ſea-port; or to uſe any outrage with ſuch intent; or to ſcatter, take away, ſpoil, or damage ſuch grain or meal; is puniſhed for the firſt offence with impriſonment and public

[l] 3 Inſt. 197.
[m] See pag. 144, 208, 235, 240.
[n] *Ff.* 47. 7. 2.

whipping:

whipping: and the second offence, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat or vessel intended for exportation, is felony, subject to transportation for seven years. By statute 28 Geo. II. c. 19. to set fire to any goss, furze, or fern, growing in any forest or chase, is subject to a fine of five pounds. By statutes 6 Geo. III. c. 36 and 48. and 13 Geo. III. c. 33. wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, is for the two first offences liable to pecuniary penalties; and for the third, if in the day time, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for seven years. By statute 9 Geo. III. c. 29. wilfully and maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine; or any fences for inclosures pursuant to any act of parliament, is made single felony, and punishable with transportation for seven years, in the offender, his advisers, and procurers. And by statute 13 Geo. III. c. 38. the like punishment is inflicted on such as break into any house, &c. belonging to the plate-glass company with intent to steal, cut, or destroy, any of their stock or utensils, or shall wilfully and maliciously cut or destroy the same. And these are the principal punishments of malicious mischief (*m*).

III. For-

(*m*) [And by statute 22 Geo. III. c. 40. if any person shall by day or by night break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any serge or other woollen goods in the loom, or any tools employed in making thereof, or any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture in the loom, or any warp or shute, tools, tackle, or utensils, or any linen or cotton, or linen and cotton mixed with any other marials, or other linen or cotton manufactures in the loom, or any warp, shute, tools, tackle, and utensils; or shall wilfully and maliciously cut or destroy any such serges or woollen goods in the loom, or on the rack; or shall burn, cut, or destroy any rack on which any such serges or other woollen goods are hanged in order to dry; or shall wilfully and maliciously cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture in the loom, or any warp, shute, tools, tackle, or utensils prepared or employed in or for the making thereof, or any linen or cotton, or linen or cotton mixed with any other materials, or other linen and cotton manufacture in the loom, or any warp or shute, tools, tackle and utensils prepared for or employed in the making thereof, or shall wilfully and maliciously break or destroy any tools used

in

III. FORGERY, or the *crimen falsi*, is an offence, which was punished by the civil law with deportation or banishment, and sometimes with death[o]. It may with us be defined (at common law) to be, "the fraudulent making or "alteration of a writing to the prejudice of another man's "right:" for which the offender may suffer fine, imprisonment, and pillory. And also, by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

By statute 5 Eliz. c. 14. to forge or make, or knowingly to publish or give in evidence, any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages; by standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared; by forfeiture to the crown of the profits of his lands, and by perpetual imprisonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment: the second offence in both cases being felony without benefit of clergy.

BESIDES this general act, a multitude of others, since the revolution (when paper credit was first established) have inflicted capital punishment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other securities[p]: of bills of credit issued from the exche-

[o] *Inst.* 4. 18. 7.

[p] Stat. 8 & 9 W. III. c. 20. §. 36. 11 Geo. I. c. 9. 12 Geo. I. c. 32. 15 Geo. II. c. 13. 13 Geo. III. c. 79.

in the making any such serges or other woollen goods, or any tools used in the weaving or making of any such velvet, &c. or any tools used in and for the carding, spinning, weaving, preparing or making any such linen or cotton, not having the consent of the owner so to do, shall be guilty of felony without benefit of clergy.]

quer;

quer[q]; of south sea bonds, &c.[r]; of lottery tickets or orders[s]; of army or navy debentures[t]; of East India bonds[u]; of writings under seal of the London, or royal exchange assurance[w]; of the hand of the receiver of the pre-fines[x], or of the accountant-general and certain other officers of the court of chancery[y]; of a letter of attorney or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends[z]: also on the personating, or procuring to be personated, any seaman or other person, entitled to wages or other naval emoluments, or any of his personal representatives; and the taking, or procuring to be taken, any false oath in order to obtain a probate, or letters of administration, in order to receive such payments; and the forging, or procuring to be forged, and likewise the uttering or publishing, as true, of any counterfeited seaman's will or power[a]: to which may be added, though not strictly reducible to this head, the counterfeiting of mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of Barbary[b]; the forging or imitating of any stamps to defraud the public revenue[c]; and the forging of any marriage register or licence[d]: all which are by distinct acts of parliament made felonies without benefit of clergy. By statutes 13 Geo. III. c. 52 & 59. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are punished with transportation for fourteen years (n). By statute 12 Geo. III. c. 48. certain frauds

q See the several acts for issuing them.

r Stat. 9 Ann. c. 21. 6 Geo. I. c. 4. & 11. 12 Geo. I. c. 32.

s See the several acts for the lotteries.

t Stat. 5 Geo. I. c. 14. 9 Geo I. c. 5.

u Stat. 12 Geo. I. c. 32.

w Stat. 6 Geo. I. c. 18.

x Stat. 32 Geo. II. c. 14.

y Stat. 12 Geo. I. c. 32.

z Stat. 8 Geo. I. c. 22. 9 Geo. I. c. 12. 31 Geo. II. c. 22. §. 77.

a Stat. 31 Geo. II. c. 10. 9 Geo. III. c. 30.

b Stat. 4 Geo. II. c. 18.

c See the several stamp acts.

d Stat. 26 Geo. II. c. 33.

(n) [And by statute 24 Geo. III. sess. 2. c. 53. any person who shall counterfeit any stamp to be used in pursuance of that act, for the making of gold or silver plate, or shall stamp any wrought plate with any counterfeit

frauds on the ſtamp-duties, therein deſcribed, principally by uſing the ſame ſtamps more than once, are made ſingle felony, and liable to tranſportation for ſeven years. And the ſame puniſhment is inflicted by ſtatute 13 Geo. III. c. 38, on ſuch as counterfeit the common ſeal of the corporation for manufacturing plate-glaſs, (thereby erected) or knowingly demand money of the company by virtue of any writing under ſuch counterfeit ſeal (*o*).

THERE are alſo certain other general laws, with regard to forgery; of which the firſt is 2 Geo. II. c. 25. whereby the firſt offence in forging or procuring to be forged, acting or aſſiſting therein, or uttering or publiſhing as true any forged deed, will, bond, writing obligatory, bill of exchange, promiſſory note, indorſement or aſſignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any perſon, (or corporation[e]) is made felony without benefit of clergy. And by ſtatutes 7 Geo. II. c. 22. and 18 Geo. III. c. 18. it is equally penal to forge or cauſe to be forged or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal ſum of any accountable receipt for any note, bill, or any other ſecurity for money; or any warrant or order for the payment of money, or delivery of goods. So that, I believe, through the number of theſe general and ſpecial proviſions, there is now hardly a caſe poſſible to be conceived, wherein forgery, that tends to defraud,

[e] Stat. 31 Geo. II. c. 22. §. 78.

terfeit ſtamp, or ſhall remove from one piece of wrought plate to another any ſtamp, or ſhall ſell or export any plate, &c. with ſuch counterfeit ſtamp thereon, ſhall be guilty of felony without benefit of clergy.]

(*o*) [And by ſtatute 24 Geo. III. ſeſſ. 2. c. 37. if any perſon ſhall forge the hand-writing of any perſon, in the ſuperſcription of any letter or packet to be ſent by the poſt, in order to avoid the payment of the duty of poſtage, or ſhall forge the date upon the ſuperſcription of any letter, or ſhall write and ſend by the poſt any letter or packet, the ſuperſcription or cover whereof ſhall be forged, or the date upon ſuch cover altered in order to avoid payment of the duty of poſtage, knowing the ſame to be forged, he ſhall be guilty of felony, and ſhall be tranſported for ſeven years.]

whether

whether in the name of a real or fictitious person[f], is not made a capital crime.

THESE are the principal infringements of the rights of property; which were the last species of offences against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offences, of publicly pernicious consequences, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemesnors, with the punishment annexed to each, that are cognizable by the laws of England.

f Fost. 116, &c.

CHAPTER THE EIGHTEENTH.

OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch or head, under which I propofed to confider the fubject of this book of our commentaries; *viz*. the means of *preventing* the commiffion of crimes and mifdemefnors. And really it is an honour, and almoft a fingular one, to our Englifh laws, that they furnifh a title of this fort: fince *preventive* juftice is upon every principle of reafon, of humanity, and of found policy, preferable in all refpects to *punifhing* juftice [a]; the execution of which, though neceffary, and in it's confequence a fpecies of mercy to the commonwealth, is always attended with many harfh and difagreeable circumftances.

THIS preventive juftice confifts in obliging thofe perfons, whom there is a probable ground to fufpect of future mifbehaviour, to ftipulate with and to give full affurance to the public, that fuch offence as is apprehended fhall not happen; by finding pledges or fecurities for keeping the peace, or for their good behaviour. This requifition of fureties has been feveral times mentioned before, as part of the penalty inflicted upon fuch as have been guilty of certain grofs mifdemefnors: but there alfo it muft be underftood rather as a caution againft the repetition of the offence, than any immediate pain or punifhment. And indeed, if we confider all human

[a] Beccar. ch. 41.

punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter[b], all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example: all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability, or example. But the caution, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.

By the Saxon constitution these sureties were always at hand, by means of king Alfred's wise institution of decennaries or frankpledges; wherein, as has more than once been observed[c], the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct: of which we find mention in the laws of king Edward the confessor[d]; "*tradat fidejussores* "*de pace et legalitate tuenda.*" Let us therefore consider, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

1. This security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer: whereby the parties acknowlege themselves to be indebted to the crown in the sum required, (for instance 100*l*) with condition to be void and of none effect, if the

[b] See pag. 11. [c] See Vol. I. pag. 114. [d] *cap.* 18.

party ſhall appear in court on ſuch a day, and in the mean time ſhall keep the peace; either generally, towards the king, and all his liege people; or particularly alſo, with regard to the perſon who craves the ſecurity. Or, if it be for the good behaviour, then on condition that he ſhall demean and behave himſelf well, (or be of good behaviour) either generally or ſpecially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a juſtice of the peace, muſt be certified to the next ſeſſions, in purſuance of the ſtatute 3 Hen. VII. c. 1. and if the condition of ſuch recognizance be broken, by any breach of the peace in the one caſe, or any miſbehaviour in the other, the recognizance becomes forfeited or abſolute; and, being *eſtreated* or extracted (taken out from among the other records) and ſent up to the exchequer, the party and his ſureties having now become the king's abſolute debtors, are ſued for the ſeveral ſums in which they are reſpectively bound.

2. ANY juſtices of the peace, by virtue of their commiſſion, or thoſe who are *ex officio* conſervators of the peace, as was mentioned in a former volume [e], may demand ſuch ſecurity according to their own diſcretion; or it may be granted at the requeſt of any ſubject, upon due cauſe ſhewn, provided ſuch demandant be under the king's protection; for which reaſon it has been formerly doubted, whether jews, pagans, or perſons convicted of a *praemunire*, were entitled thereto [f]. Or, if the juſtice is averſe to act, it may be granted by a mandatory writ, called a *ſupplicavit*, iſſuing out of the court of king's bench or chancery; which will compel the juſtice to act, as a miniſterial and not as a judicial officer: and he muſt make a return to ſuch writ, ſpecifying his compliance, under his hand and ſeal [g]. But this writ is ſeldom uſed: for, when application is made to the ſuperior courts, they uſually take the recognizances there, under the directions of the ſtatute 21 Jac. I. c. 8. And indeed a peer or peereſs cannot be bound over in any other place, than the courts of

e See Vol. I. pag. 350.
f 1 Hawk. P. C. 126.
g F. N. B. 80. 2 P. Wms. 202.

king's bench or chancery: though a justice of the peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility, whether he be a fellow justice or other magistrate, or whether he be merely a private man[h]. Wives may demand it against their husbands; or husbands, if necessary, against their wives[i]. But feme-coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowlegements.

3. A RECOGNIZANCE may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assises, or king's bench) if they see sufficient cause: or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued[j].

THUS far what has been said is applicable to both species of recognizances, for the *peace*, and for the *good behaviour*; *de pace, et legalitate, tuenda*, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately: and first, shall shew for what cause such a recognizance, with sureties for the *peace*, is grantable; and then, how it may be forfeited.

1. ANY justice of the peace may, *ex officio*, bind all those to keep the peace, who in his presence make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons

h 1 Hawk. P. C. 127.
i 2 Stra. 1207.
j 1 Hawk. P. C. 129.

or

or attendance, to the terror of the people; and all ſuch as he knows to be common barretors; and ſuch as are brought before him by the conſtable for a breach of the peace in his preſence; and all ſuch perſons, as, having been before bound to the peace, have broken it and forfeited their recognizances[k]. Alſo, wherever any private man hath juſt cauſe to fear, that another will burn his houſe, or do him a corporal injury, by killing, impriſoning, or beating him; or that he will procure others ſo to do; he may demand ſurety of the peace againſt ſuch perſon: and every juſtice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will ſhew that he has juſt cauſe to be ſo, by reaſon of the other's menaces, attempts, or having lain in wait for him; and will alſo farther ſwear, that he does not require ſuch ſurety out of malice or for mere vexation[l]. This is called *ſwearing the peace* againſt another: and, if the party does not find ſuch ſureties, as the juſtice in his diſcretion ſhall require, he may immediately be committed till he does[m].

2. SUCH recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an aſſault, or menace, to the perſon of him who demanded it, if it be a ſpecial recognizance: or, if the recognizance be general, by any unlawful action whatſoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many ſpecies of offences which were mentioned as crimes againſt the public peace in the eleventh chapter of this book: or, by any private violence committed againſt any of his majeſty's ſubjects. But a bare treſpaſs upon the lands or goods of another, which is a ground for a civil action, unleſs accompanied with a wilful breach of the peace, is no forfeiture of the recognizance[n]. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, ſo as to forfeit one's recognizance (being looked

k 1 Hawk. P. C. 126.
l *Ibid.* 127.
m *Ibid.* 128.
n *Ibid.* 131.

upon to be merely the effect of unmeaning heat and passion) unless they amount to a challenge to fight [o].

THE other species of recognizance, with sureties, is for the *good abearance*, or *good behaviour*. This includes security for the peace, and somewhat more: we will therefore examine it in the same manner as the other.

1. FIRST then, the justices are empowered by the statute 34 Edw. III. c. 1. to bind over to the good behaviour towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But, if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one [p].

[o] 1 Hawk. P. C. 130.

[p] *Ibid.* 132.

2. A

2. A RECOGNIZANCE for the good behaviour may be forfeited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or, by committing any of those acts of misbehaviour, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen [q]: for, though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

q 1 Hawk. P. C. 133.

CHAPTER THE NINETEENTH.

OF COURTS OF A CRIMINAL JURISDICTION.

THE ſixth, and laſt, object of our inquiries will be the method of *inflicting* thoſe *puniſhments*, which the law has annexed to particular offences; and which I have conſtantly ſubjoined to the deſcription of the crime itſelf. In the diſcuſſion of which I ſhall purſue much the ſame general method that I followed in the preceding book, with regard to the redreſs of civil injuries: by, firſt, pointing out the ſeveral *courts* of criminal juriſdiction, wherein offenders may be proſecuted to puniſhment; and by, ſecondly, deducing down in their natural order, and explaining, the ſeveral *proceedings* therein.

FIRST, then, in reckoning up the ſeveral *courts* of criminal juriſdiction, I ſhall, as in the former caſe, begin with an account of ſuch, as are of a *public* and *general* juriſdiction throughout the whole realm; and, afterwards, proceed to ſuch, as are only of a *private* and *ſpecial* juriſdiction, and confined to ſome particular parts of the kingdom.

I. IN our inquiries into the criminal courts of *public* and *general* juriſdiction, I muſt in one reſpect purſue a different order from that in which I conſidered the civil tribunals. For there, as the ſeveral courts had a gradual ſubordination to each other, the ſuperior correcting and reforming the errors of the inferior, I thought it beſt to begin with the loweſt, and ſo aſcend gradually to the courts of appeal, or thoſe of

the moſt extenſive powers. But as it is contrary to the genius and ſpirit of the law of England, to ſuffer any man to be tried twice for the ſame offence in a criminal way, eſpecially if acquitted upon the firſt trial; therefore theſe criminal courts may be ſaid to be all independent of each other: at leaſt ſo far, as that the ſentence of the loweſt of them can never be controlled or reverſed by the higheſt juriſdiction in the kingdom, unleſs for error in matter of law, apparent upon the face of the record; though ſometimes cauſes may be removed from one to the other before trial. And therefore as, in theſe courts of criminal cognizance, there is not the ſame chain and dependence as in the others, I ſhall rank them according to their dignity, and begin with the higheſt of all; *viz.*

1. THE high court of *parliament;* which is the ſupreme court in the kingdom, not only for the making, but alſo for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular perſons of treaſon or felony, or to inflict pains and penalties, beyond or contrary to the common law, to ſerve a ſpecial purpoſe, I ſpeak not of them; being to all intents and purpoſes new laws, made *pro re nata*, and by no means an execution of ſuch as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a proſecution of the already known and eſtabliſhed law, and has been frequently put in practice; being a preſentment to the moſt high and ſupreme court of criminal juriſdiction by the moſt ſolemn grand inqueſt of the whole kingdom [a]. A commoner cannot however be impeached before the lords for any capital offence, but only for high miſdemeſnors [b]: a peer may be impeached for any crime.

[a] 1 Hal. P. C. * 150.

[b] When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment againſt Simon de Bereford, who had been a notorious accomplice in the treaſons of Roger earl of Mortimer, they came before the king in parliament, and ſaid all with one voice, that the ſaid Simon was not their *peer*; and therefore they were not bound to judge

crime. And they usually (in case of an impeachment of a peer for treason) address the crown to appoint a lord high steward, for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king [c]; but it hath of late years been strenuously maintained [d], that the appointment of an high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords; who are in cases of misdemesnors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the antient Germans; who in their great councils sometimes tried capital accusations relating to the public: "*licet apud consilium accusare quoque, et discrimen* "*capitis intendere* [e]." And it has a peculiar propriety in the English constitution; which has much improved upon the antient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be most carefully avoided [f], yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either

judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered in the parliament-roll. "And it is assented "and accorded by our lord the king, "and all the great men, in full parlia-"ment, that albeit the peers, as judges "of the parliament, have taken upon "them in the presence of our lord the "king to make and render the said judg-"ment; yet the peers who now are, or "shall be in time to come, be not bound "or charged to render judgment upon "others than peers; nor that the peers "of the land have power to do this, but "thereof ought ever to be discharged "and acquitted; and that the aforesaid "judgment now rendered be not drawn "to example or consequence in time to "come, whereby the said peers may be "charged hereafter to judge others than "their peers, contrary to the laws of the "land, if the like case happen, which "God forbid." (*Rot. Parl.* 4 *Edw. III. n.* 2 & 6. 2 Brad. Hist. 190. Selden. judic. in parl. ch. 1.)

c 1 Hal. P. C. 350.

d Lords Journ. 12 May 1679. Com. Journ. 15 May 1679. Fost. 142, &c.

e Tacit. *de mor. Germ.* 12.

f See Vol. I. pag. 269.

dares

dares not or cannot puniſh. Of theſe the repreſentatives of the people, or houſe of commons, cannot properly *judge*: becauſe their conſtituents are the parties injured: and can therefore only *impeach*. But before what court ſhall this impeachment be tried? Not before the ordinary tribunals, which would naturally be ſwayed by the authority of ſo powerful an accuſer. Reaſon therefore will ſuggeſt, that this branch of the legiſlature, which repreſents the people, muſt bring it's charge before the other branch, which conſiſts of the nobility, who have neither the ſame intereſts, nor the ſame paſſions as popular aſſemblies [g]. This is a vaſt ſuperiority, which the conſtitution of this iſland enjoys, over thoſe of the Grecian or Roman republics; where the people were at the ſame time both judges and accuſers. It is proper that the nobility ſhould judge, to inſure juſtice to the accuſed; as it is proper that the people ſhould accuſe, to inſure juſtice to the commonwealth. And therefore, among other extraordinary circumſtances attending the authority of this court, there is one of a very ſingular nature, which was inſiſted on by the houſe of commons in the caſe of the earl of Danby in the reign of Charles II [h]; and it is now enacted by ſtatute 12 & 13 W. III. c. 2. that no pardon under the great ſeal ſhall be pleadable to an impeachment by the commons of Great Britain in parliament [i].

2. THE court of the *lord high ſteward* of Great Britain [k] is a court inſtituted for the trial of peers, indicted for treaſon or felony, or for miſpriſion of either [l]. The office of this great magiſtrate is very antient; and was formerly hereditary, or at leaſt held for life, or *dum bene ſe geſſerit*: but now it is uſually, and hath been for many centuries paſt [m], granted *pro hac vice* only; and it hath been the conſtant practice (and therefore ſeems now to have become neceſſary) to grant

g Monteſc. Sp. L. xi. 6.
h Com. Journ. 5 May 1679.
i See ch. 31.
k 4 Inſt. 58. 2 Hawk. P. C. 5. 421. 2 Jon. 54.
l 1 Bulſtr. 198.
m Pryn. on 4 Inſt. 46.

it

it to a lord of parliament, else he is incapable to try such delinquent peer[n]. When such an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the assises before the justices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as *guilty*, or *not guilty*, of the indictment: but only in this court: because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king therefore, in case a peer be indicted for treason, felony, or misprision, creates a lord high steward *pro hac vice* by commission under the great seal; which recites the indictment so found, and gives his grace power to receive and try it *secundum legem et consuetudinem Angliae*. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite; and the custom was, for the lord high steward to summon as many as he thought proper, (but of late years not less than twenty-three[o]) and that those lords only should sit upon the trial: which threw a monstrous weight of power into the hands of the crown, and this it's great officer, of selecting only such peers as the then predominant party should most approve of. And accordingly, when the earl of Clarendon fell into disgrace with Charles II,

[n] *Quand un* seigneur de parlement *serra arrein de treason ou felony, le roy par es lettres patents fera un grand et sage* seigneur *d'estre le grand seneschal d'Angleterre: qui—doit faire un precept—pur faire venir xx* seigneurs, *ou xviii, &c.* (Yearb. 13 *Hen. VIII.* 11.) See Staundf. P. C. 152. 3 Inst. 28. 4 Inst. 59. 2 Hawk. P. C. 5. Barr. 234.

[o] Kelynge. 56.

there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court [p]. But now, by statute 7 W. III. c. 3. upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery.

DURING the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned, of our lord the *king in parliament* [q]. It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings: but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial [r]. Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges [s], that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during it's sitting, though no high steward be existing; or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

p Carte's life of Ormonde. Vol. II.
q Fost. 141.
r State Trials, Vol. IV. 214. 232, 3.
s Fost. 139.

IT

It has been a point of ſome controverſy, whether the biſhops have now a right to ſit in the court of the lord high ſteward, to try indictments of treaſon and miſpriſion. Some incline to imagine them included under the general words of the ſtatute of king William, "all peers, who have a right "to ſit and vote in parliament:" but the expreſſion had been much clearer, if it had been, "all *lords*," and not, "all "*peers*;" for though biſhops, on account of the baronies annexed to their biſhopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not univerſally allowed to be peers with the temporal nobility: and perhaps this word might be inſerted purpoſely with a view to exclude them. However, there is no inſtance of their ſitting on trials for capital offences, even upon impeachments or indictments in full parliament, much leſs in the court we are now treating of; for indeed they uſually withdraw voluntarily, but enter a proteſt declaring their right to ſtay. It is obſervable that, in the eleventh chapter of the conſtitutions of Clarendon, made in parliament 11 Hen. II. they are expreſsly excuſed, rather than excluded, from ſitting and voting in trials, when they come to concern life or limb: "*epiſcopi, ſicut* "*caeteri barones, debent intereſſe judiciis cum baronibus, quouſque* "*perveniatur ad diminutionem membrorum, vel ad mortem*:" and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law) but of the general rule, that compelled the biſhops to attend at all. And the determination of the houſe of lords in the earl of Danby's caſe [t], which hath ever ſince been adhered to, is conſonant to theſe conſtitutions; "that the "lords ſpiritual have a right to ſtay and ſit in court in capi- "tal caſes, till the court proceeds to the vote of guilty, or "not guilty." It muſt be noted, that this reſolution extends only to trials *in full parliament*: for to the court of the lord high ſteward (in which no vote can be given, but merely that of guilty, or not guilty) no biſhop, as ſuch, ever was or could be ſummoned; and though the ſtatute of king William

[t] Lords Journ. 15 May 1679.

regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new-model or alter it's constitution; and consequently does not give the lords spiritual any right in cases of blood which they had not before [u]. And what makes their exclusion more reasonable, is, that they have no right to be tried themselves in the court of the lord high steward [w], and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house; as appears from the trials of popish lords, of lords under age, and (since the union) of the Scots nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager, and of all peeresses by birth; and peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband.

3. THE court of *king's bench* [x], concerning the nature of which we partly inquired in the preceding book [y], was (we may remember) divided into a *crown* side, and a *plea* side. And on the crown side, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemesnor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius*, by a jury of the county out of which the indictment is brought. The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the sickness in 1665) all former commissions of *oyer* and *terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto*: in the same manner as by the old Gothic and Saxon constitu-

u Fost. 248.
w Bro. *Abr. t. Trial.* 142.
x 4 Inst. 70. 2 Hal P. C. 2. 2 Hawk. P. C. 6.
y See Vol. III. pag. 41.

tions,

tions, "*jure vetusto obtinuit, quievisse omnia inferiora judicia, dicente jus rege*[z] (*p*)."

INTO this court of king's bench hath reverted all that was good and salutary of the jurisdiction of the court of *star-chamber*, *camera stellata*[a]: which was a court of very antient original,

[z] Stiernhook. *l.* 1. *c.* 2.

[a] This is said (Lamb. *Arch.* 154.) to have been so called, either from the Saxon word steoran to *steer* or govern;—or from it's punishing the *crimen stellionatus*, or cosenage;—or because the room wherein it sate, the old council chamber of the palace of Westminster, (Lamb. 148.) which is now converted into the lottery-office, and forms the eastern side of new palace-yard, was full of windows;—or (to which sir Edward Coke, 4 Inst. 66. accedes) because *haply* the roof thereof was at the first garnished with gilded *stars*. As all these are merely conjectures, (for no stars are now in the roof, nor any are said to have remained there so late as the reign of queen Elizabeth) it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that, before the banishment of the Jews under Edward I, their contracts and obligations were denominated in our antient records *starra* or *starrs*, from a corruption of the Hebrew word, *shetar*, a covenant. (Tovey's *Angl. judaic.* 32. Selden. tit. of hon. ii. 34. *Uxor. Ebraic.* i. 14.) These starrs, by an ordinance of Richard the first, preserved by Hoveden, were commanded to be enrolled and deposited in chests under three keys in certain places; one, and the most considerable, of which was in the king's exchequer at Westminster: and no starr was allowed to be valid, unless it were found in some of the said repositories. (*Memorand. in Scacc'. P.* 6 *Edw.* I. prefixed to Maynard's year-book of Edw. II. fol. 8. Madox hist. exch. c. vii. §. 4, 5, 6.) The room at the exchequer, where the chests containing these starrs were kept, was probably called the *starr-chamber*; and, when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the star-chamber is mentioned in any record, it is said to have been situated near the receipt of the exchequer at Westmin-

(*p*) [But this is now altered with respect to the session of gaol delivery for Middlesex by statute 25 Geo. III. c. 18. which enacts that when any session of oyer and terminer and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall have been begun to be holden before the essoign day of any term, that the same session shall be continued to be holden, and the business thereof finally concluded, notwithstanding the happening of such essoign day of any term, or the sitting of his majesty's court of king's bench at Westminster, or elsewhere in the county of Middlesex; and that all trials, &c. had at such session so continued to be holden, shall be good and effectual to all intents and purposes.]

original[b], but new-modelled by statutes 3 Hen. VII. c. 1. and 21 Hen. VIII. c. 20. consisting of divers lords spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemesnors, contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs us[c]) stretched "to "the asserting of all proclamations, and orders of state: to "the vindicating of illegal commissions, and grants of mo-"nopolies; holding for honourable that which pleased, and "for just that which profited, and becoming both a court "of law to determine civil rights, and a court of revenue to "enrich the treasury: the council table by proclamations "enjoining to the people that which was not enjoined by "the laws, and prohibiting that which was not prohibited; "and the star-chamber, which consisted of the same persons "in different rooms, censuring the breach and disobedience "to those proclamations by very great fines, imprisonments, "and corporal severities: so that any disrespect to any acts "of state, or to the persons of statesmen, was in no time "more penal, and the foundations of right never more in "danger to be destroyed." For which reasons it was finally abolished by statute 16 Car. I. c. 10. to the general joy of the whole nation[d].

Westminster: (the king's council, his chancellor, treasurer, justices, and other sages, were assembled *en la chambre des steilles pres la resceipt al Westminster.*—*Claus.* 41 *Edw. III. m.* 13.) For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law-french, *la chaumbre des esteilles*, and in law-latin *camera stellata*; which continued to be the stile in latin till the dissolution of that court.

b Lamb. *Arch.* 156.

c Hist. of reb. book 1 & 3.

d The just odium into which this tribunal had fallen before it's dissolution, has been the occasion that few memorials have reached us of it's nature, jurisdiction, and practice; except such as, on account of their enormous oppression, are recorded in the histories of the times. There are however to be met with some reports of it's proceedings in Dyer, Croke, Coke, and other reporters of that age, and some in manuscript; of which the author hath two; one from 40 Eliz. to 13 Jac. I. the other for the first three years of king Charles: and there is in the British Museum (Harl. MSS. Vol. I. no. 1226) a very full, methodical, and accurate account of the constitution and course of this court, compiled by William Hudson of Gray's Inn, an eminent practitioner therein; and a short account of the same, with copies of all it's process, may also be found in 18 Rym. *Foed.* 192, &c.

4. THE court of *chivalry*[e], of which we alſo formerly ſpoke[f] as a military court, or court of honour, when held before the earl marſhal only, is alſo a criminal court, when held before the lord high conſtable of England jointly with the earl marſhal. And then it has juriſdiction over pleas of life and member, ariſing in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of it's authority, is fallen into entire diſuſe: there having been no permanent high conſtable of England (but only *pro hac vice* at coronations and the like) ſince the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a ſubject: ſo ample, that when the chief juſtice Fineux was aſked by king Henry the eighth, how far they extended, he declined anſwering: and ſaid, the deciſion of that queſtion belonged to the law of arms, and not to the law of England[g].

5. THE high court of *admiralty*[h], held before the lord high admiral of England, or his deputy, ſtiled the judge of the admiralty, is not only a court of civil, but alſo of criminal, juriſdiction. This court hath cognizance of all crimes and offences committed either upon the ſea, or on the coaſts, out of the body or extent of any Engliſh county; and, by ſtatute 15 Ric. II. c. 3. of death and mayhem happening in great ſhips being and hovering in the main ſtream of great rivers, below the bridges of the ſame rivers, which are then a ſort of ports or havens; ſuch as are the ports of London and Glocеſter, though they lie at a great diſtance from the ſea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exerciſe of a criminal juriſdiction there was contrary to the genius of the law of England; inaſmuch as a man might be there deprived of his life by the opinion of a ſingle judge, without the judgment of his peers. And beſides, as innocent perſons might thus fall a ſacrifice to the caprice of a ſingle man, ſo very groſs offenders might, and did frequently, eſcape pu-

e 4 Inſt. 123. 2 Hawk. P. C. 9.

f See Vol. III. pag. 68.

g Duck *de authorit. jur. civ.*

h 4 Inſt. 134. 147.

niſhment:

niſhment: for the rule of the civil law is, how reaſonably I ſhall not at preſent inquire, that no judgment of death can be given againſt offenders, without proof by two witneſſes, or a confeſſion of the fact by themſelves. This was always a great offence to the Engliſh nation: and therefore in the eighth year of Henry VI it was endeavoured to apply a remedy in parliament: which then miſcarried for want of the royal aſſent. However, by the ſtatute 28 Hen. VIII. c. 15. it was enacted, that theſe offences ſhould be tried by commiſſioners of *oyer* and *terminer*, under the king's great ſeal; namely, the admiral, or his deputy, and three or four more; (among whom two common law judges are uſually appointed) the indictment being firſt found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the courſe of proceedings ſhould be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty ſtill preſiding therein, as the lord mayor is the preſident of the ſeſſion of *oyer* and *terminer* in London.

THESE five courts may be held in any part of the kingdom, and their juriſdiction extends over crimes that ariſe throughout the whole of it, from one end to the other. What follow are alſo of a general nature, and univerſally diffuſed over the nation, but yet are of a local juriſdiction, and confined to particular diſtricts. Of which ſpecies are

6, 7. THE courts of *oyer* and *terminer*, and general *gaol delivery*[i]: which are held before the king's commiſſioners, among whom are uſually two judges of the courts at Weſtminſter, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middleſex, wherein they are held eight times. Theſe were ſlightly mentioned in the preceding book[k]. We then obſerved, that, at what is uſually called the aſſiſes, the judges ſit by virtue of five ſeveral authorities: two of which, the commiſſion of *aſſiſe* and its attendant juriſdiction of *niſi*

[i] 4 Inſt. 162. 168. 2 Hal. P. C. 22. 32. 2 Hawk. P. C. 14. 23.

[k] See Vol. III. pag. 60.

prius, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases[l]. The third, which is the commission of the *peace*, was also treated of in a former volume[m], when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assises are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c. and to assist the judges in such matters as lie within their knowlege and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer* and *terminer*[n], to hear and determine all treasons, felonies, and misdemesnors. This is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assises; for they must first inquire, by means of the grand jury or inquest, before they are impowered to hear and determine by the help of the petit jury. Therefore they have besides, fifthly, a commission of general *gaol delivery*[o]; which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was antiently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo*[p]: but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and ex-

[l] 2 Hal. P. C. 39. 2 Hawk. P. C. 28.

[m] See Vol. I. pag. 351.

[n] See appendix, § 1.

[o] *Ibid.*

[p] 2 Inst. 43.

cellence.

cellence. Sometimes alſo, upon urgent occaſions, the king iſſues a ſpecial or extraordinary commiſſion of *oyer* and *terminer*, and *gaol delivery*, confined to thoſe offences which ſtand in need of immediate inquiry and puniſhment: upon which the courſe of proceeding is much the ſame, as upon general and ordinary commiſſions. Formerly it was held, in purſuance of the ſtatutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no judge or other lawyer could act in the commiſſion of *oyer* and *terminer*, or in that of gaol delivery, within his own county, where he was born or inhabited; in like manner as they are prohibited from being judges of aſſiſe and determining civil cauſes. But that local partiality, which the jealouſy of our anceſtors was careful to prevent, being judged leſs likely to operate in the trial of crimes and miſdemeſnors, than in matters of property and diſputes between party and party, it was thought proper by the ſtatute 12 Geo. II. c. 27. to allow any man to be a juſtice of *oyer* and *terminer* and general gaol delivery within any county of England.

8. THE court of general *quarter ſeſſions* of the peace [q] is a court that muſt be held in every county, once in every quarter of a year; which by ſtatute 2 Hen. V. c. 4. is appointed to be in the firſt week after michaelmas-day: the firſt week after the epiphany; the firſt week after the cloſe of eaſter; and in the week after the tranſlation of ſaint Thomas the martyr, or the ſeventh of July. It is held before two or more juſtices of the peace, one of which muſt be of the *quorum*. The juriſdiction of this court, by ſtatute 34 Edw. III. c. 1. extends to the trying and determining all felonies and treſpaſſes whatſoever: though they ſeldom, if ever, try any greater offence than ſmall felonies within the benefit of clergy; their commiſſion providing, that, if any caſe of difficulty ariſes, they ſhall not proceed to judgment, but in the preſence of one of the juſtices of the courts of king's bench or common pleas, or one of the judges of aſſiſe. And therefore murders, and other capital felonies, are uſually remitted for a more ſolemn

[q] 4 Inſt. 170. 2 Hal. P. C. 42. 2 Hawk. P. C. 32.

trial to the assises. They cannot also try any new-created offence, without express power given them by the statute which creates it [r]. But there are many offences, and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the smaller misdemesnors, against the public or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision for the poor, vagrants, servants wages, apprentices, and popish recusants [f]. Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of king's bench, by writ of *certiorari facias*, and be there either quashed or confirmed. The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum*, who is always a justice of the *quorum*; and among them of the *quorum* (saith Lambard [s]) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the *custos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expresly forbidden to sell for money [t].

In most corporation towns there are quarter-sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by statute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is sometimes kept a

[r] 4 Mod. 379. Salk. 406. Lord Raym. 1144.

[f] See Lambard *eirenarcha* and Burn's justice.

[s] b. 4. c. 3.

[t] Stat. 37 Hen. VIII. c. 1. 1 W. & M. st. 1. c. 21.

special

ſpecial or petty ſeſſion, by a few juſtices, for diſpatching ſmaller buſineſs in the neighbourhood between the times of the general ſeſſions; as, for licenſing alehouſes, paſſing the accounts of the pariſh officers, and the like.

9. THE *ſheriff's tourn* [u], or rotation, is a court of record, held twice every year within a month after eaſter and michaelmas, before the ſheriff, in different parts of the county; being indeed only the turn of the ſheriff to keep a court-leet in each reſpective hundred [w]: This therefore is the great court-leet of the county, as the county court is the court-baron: for out of this, for the eaſe of the ſheriff, was taken

10. THE *court-leet*, or *view of frankpledge* [x], which is a court of record, held once in the year and not oftener [y], within a particular hundred, lordſhip, or manor, before the ſteward of the leet; being the king's court granted by charter to the lords of thoſe hundreds or manors. It's original intent was to view the frank pledges, that is, the freemen within the liberty; who, (we may remember [z]) according to the inſtitution of the great Alfred, were all mutually pledges for the good behaviour of each other. Beſides this, the preſervation of the peace, and the chaſtiſement of divers minute offences againſt the public good, are the objects both of the court-leet and the ſheriff's tourn: which have exactly the ſame juriſdiction, one being only a larger ſpecies of the other; extending over more territory, but not over more cauſes. All freeholders within the precinct are obliged to attend them, and all perſons commorant therein; which commorancy conſiſts in uſually lying there: a regulation, which owes it's original to the laws of king Canute [a]. But perſons under twelve and above ſixty years old, peers, clergymen, women, and the king's tenants in antient demeſne, are excuſed from attendance there: all others being bound to appear upon the jury, if required, and make their due preſentments. It was alſo antiently the cuſtom to ſummon all the king's ſubjects, as

u 4 Inſt. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.

w Mirr. c. 1. §. 13 & 16.

x 4 Inſt. 261. 2 Hawk. P. C. 72.

y Mirror. c. 1. §. 10.

z See Vol. III. pag. 113.

a *part* 2. *c.* 19.

they reſpectively grew to years of diſcretion and ſtrength, to come to the court-leet, and there take the oath of allegiance to the king. The other general buſineſs of the leet and tourn, was to preſent by jury all crimes whatſoever that happened within their juriſdiction; and not only to preſent, but alſo to puniſh, all trivial miſdemeſnors, as all trivial debts were recoverable in the court-baron, and county court: juſtice, in theſe minuter matters of both kinds, being brought home to the doors of every man by our antient conſtitution. Thus in the Gothic conſtitution, the *haereda*, which anſwered to our court-leet, "*de omnibus quidem cog-*" "*noſcit, non tamen de omnibus judicat*[b]." The objects of their juriſdiction are therefore unavoidably very numerous: being ſuch as in ſome degree, either leſs or more, affect the public weal, or good governance of the diſtrict in which they ariſe; from common nuſances and other material offences againſt the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumſtance, owing in part to the diſcharge granted by the ſtatute of Marlbridge, 52 Hen. III. c. 10. to all prelates, peers, and clergymen from their attendance upon theſe courts; which occaſioned them to grow into diſrepute. And hence it is that their buſineſs hath for the moſt part gradually devolved upon the quarter ſeſſions: which it is particularly directed to do in ſome caſes by ſtatute 1 Ed. IV. c. 2.

11. THE court of the *coroners*[c] is alſo a court of record, to inquire, when any one dies in priſon, or comes to a violent or ſudden death, by what manner he came to his end. And this he is only entitled to do *ſuper viſum corporis*. Of the coroner and his office we treated at large in a former volume[d], among the public officers and miniſters of the kingdom; and therefore ſhall not here repeat our inquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation.

b Stiernh. *de jur. Goth. l.* 1. *c.* 2. 2 Hawk. P. C. 42.
c 4 Inſt. 271. 2 Hal. P. C. 53. d See Vol. I. pag. 349.

12. THE court of the *clerk of the market*[e] is incident to every fair and market in the kingdom, to punish misdemesnors therein; as a court of *pie poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction[f] is principally the cognizance of weights and measures, to try whether they be according to the true standard thereof, or no: which standard was antiently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though now usually a layman, is called the *clerk* of the market[g]. If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom; though the objects of it's coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the curule aediles.

II. THERE are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places, which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemesnors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I SPEAK not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animae*; or, which is looked upon as equivalent to all the rest, by a sum of mo-

e 4 Inst. 273.

f See stat. 17 Car. II. c. 19. 22 Car. II. c. 8. 23 Car. II. c. 12.

g Bacon of English Gov. b. 1. c. 8.

ney

ney to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book [h]. I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. AND, first, the court of the *lord steward*, *treasurer*, or *comptroller* of the king's *houshold* [i], was instituted by statute 3 Hen. VII. c. 14. to inquire of felony by any of the king's sworn servants, in the checque roll of the houshold, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men, (that is, sober and discreet persons) of the king's houshold.

2. THE court of the *lord steward* of the king's *houshold*, or (in his absence) of the treasurer, comptroller, and steward of the *marshalsea* [k], was erected by statute 33 Hen. VIII. c. 12. with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings; whereby blood shall be shed in, or within the limits, (that is, within two hundred feet from the gate) of any of the palaces and houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and petit one, as at common law, taken out of the officers and sworn servants of the king's houshold. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, are very minutely set forth in the said statute 33 Hen. VIII. and the several officers of the servants of the houshold in and about such execution are

h See Vol. III. pag. 61.

i 4 Inst. 133.

k *Ibid.* 2 Hal. P. C. 7.

described;

described; from the serjeant of the wood-yard, who furnishes the chopping-block, to the serjeant farrier, who brings hot irons to sear the stump.

3. As in the preceding book[1] we mentioned the courts of the two universities, or their chancellor's courts, for the redress of civil injuries; it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a similar jurisdiction) hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdemesnors under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues: but the trial of treason, felony, and mayhem, by a particular charter is committed to the university jurisdiction in another court, namely, the court of the *lord high steward* of the university.

For by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the rest, by the statute 13 Eliz. c. 29.) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony, and mayhem, which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the said university. When therefore an indictment is found

[1] See Vol. III. pag. 83.

at

at the aſſiſes, or elſewhere, againſt any ſcholar of the univerſity, or other privileged perſon, the vice-chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of aſſiſe: and then it comes to be tried in the high ſteward's court. But the indictment muſt firſt be found by a grand jury, and then the cognizance claimed: for I take it that the high ſteward cannot proceed originally *ad inquirendum*; but only, after inqueſt in the common law courts, *ad audiendum et determinandum*. Much in the ſame manner, as, when a peer is to be tried in the court of the lord high ſteward of Great Britain, the indictment muſt firſt be found at the aſſiſes, or in the court of king's bench, and then (in conſequence of a writ of *certiorari*) tranſmitted to be finally heard and determined before his grace the lord high ſteward and the peers.

WHEN the cognizance is ſo allowed, if the offence be *inter minora crimina*, or a miſdemeſnor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treaſon, felony, or mayhem, it is then, and then only, to be determined before the high ſteward, under the king's ſpecial commiſſion to try the ſame. The proceſs of the trial is this. The high ſteward iſſues one precept to the ſheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the univerſity, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio univerſitatis gaudentes*:" and by a jury formed *de medietate*, half of freeholders and half of matriculated perſons, is the indictment to be tried; and that in the Guildhall of the city of Oxford. And if execution be neceſſary to be awarded, in conſequence of finding the party guilty, the ſheriff of the county muſt execute the univerſity proceſs; to which he is annually bound by an oath.

I HAVE

I HAVE been the more minute in describing these proceedings, as there has happily been no occasion to reduce them into practice for more than a century past; nor will it perhaps ever be thought adviseable to revive them: though it is not a right that merely rests *in scriptis* or theory, but has formerly often been carried into execution. There are many instances, one in the reign of queen Elizabeth, two in that of James the first, and two in that of Charles the first, where indictments for murder have been challenged by the vice-chancellor at the assises, and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriff's and bedell's panels, and all the other proceedings on the trial of the several indictments, are still extant in the archives of that university.

CHAPTER THE TWENTIETH.

OF SUMMARY CONVICTIONS.

WE are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds; *summary*, and *regular*: of the former of which I shall briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

By a *summary* proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence.

fence. But it has of late been so far extended, as if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases. For,

I. Of this summary nature are all trials of offences and frauds contrary to the laws of the *excise*, and other branches of the *revenue:* which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removable at the discretion of the crown. And though such convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by action or indictment; and though such has usually been the *conduct* of the commissioners, as seldom (if ever) to afford just grounds to complain of oppression; yet when we again [a] consider the various and almost innumerable branches of this revenue; which may be in their turns the subjects of fraud, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction; we shall find that the *power* of these officers of the crown over the property of the people is increased to a very formidable height.

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited [b], and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath however had some mischievous effects; as, 1. The almost entire disuse and contempt of the court-leet, and sheriff's tourn, the king's antient courts of common law, formerly much revered and respected.

[a] See Vol. I. pag. 319, &c.

[b] Lambard and Burn.

2. The

2. The burthenſome increaſe of the buſineſs of a juſtice of the peace, which diſcourages ſo many gentlemen of rank and character from acting in the commiſſion; from an apprehenſion that the duty of their office would take up too much of that time, which they are unwilling to ſpare from the neceſſary concerns of their families, the improvement of their underſtandings, and their engagements in other ſervices of the public. Though if *all* gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the buſineſs of a juſtice of the peace would be more divided, and fall the leſs heavy upon individuals: which would remove what in the preſent ſcarcity of magiſtrates is really an objection ſo formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in conſequence of his rank in life he owes more peculiarly to his country. However, this backwardneſs to act as magiſtrates, ariſing greatly from this increaſe of ſummary juriſdiction, is productive of, 3. A third miſchief: which is, that this truſt, when ſlighted by gentlemen, falls of courſe into the hands of thoſe who are not ſo; but the mere tools of office. And then the extenſive power of a juſtice of the peace, which even in the hands of men of honour is highly formidable, will be proſtituted to mean and ſcandalous purpoſes, to the low ends of ſelfiſh ambition, avarice, or perſonal reſentment. And from theſe ill conſequences we may collect the prudent foreſight of our antient lawgivers, who ſuffered neither the property nor the puniſhment of the ſubject to be determined by the opinion of any one or two men; and we may alſo obſerve the neceſſity of not deviating any farther from our antient conſtitution, by ordaining new penalties to be inflicted upon ſummary convictions.

THE proceſs of theſe ſummary convictions, it muſt be owned, is extremly ſpeedy. Though the courts of common law have thrown in one check upon them, by making it neceſſary to *ſummon* the party accuſed before he is condemned.

demned. This is now held to be an indiſpenſible requiſite [c]: though the juſtices long ſtruggled the point; forgetting that rule of natural reaſon expreſſed by Seneca,

> "*Qui ſtatuit aliquid, parte inaudita altera,*
> "*Aequum licet ſtatuerit, haud aequus fuit.*"

A rule, to which all municipal laws, that are founded on the principles of juſtice, have ſtrictly conformed: the Roman law requiring a citation at the leaſt; and our own common law never ſuffering any fact (either civil or criminal) to be tried, till it has previouſly compelled an appearance by the party concerned. After this ſummons, the magiſtrate, in ſummary proceedings, may go on to examine one or more witneſſes, as the ſtatute may require, upon oath; and then make his conviction of the offender, in writing: upon which he uſually iſſues his warrant, either to apprehend the offender, in caſe corporal puniſhment is to be inflicted on him; or elſe to levy the penalty incurred, by diſtreſs and ſale of his goods. This is, in general, the method of ſummary proceedings before a juſtice or juſtices of the peace: but for particulars we muſt have recourſe to the ſeveral ſtatutes, which create the offence, or inflict the puniſhment; and which uſually chalk out the method by which offenders are to be convicted. Otherwiſe they fall of courſe under the general rule, and can only be convicted by indictment or information at the common law.

III. To this head, of ſummary proceedings, may alſo be properly referred the method, immemorially uſed by the ſuperior courts of juſtice, of puniſhing contempts by *attachment*, and the ſubſequent proceedings thereon.

THE contempts, that are thus puniſhed, are either *direct*, which openly inſult or reſiſt the powers of the courts, or the perſons of the judges who preſide there; or elſe are *conſequential*, which (without ſuch groſs inſolence or direct oppoſition)

[c] Salk. 181. 2 Lord Raym. 1405.

plainly tend to create an univerſal diſregard of their authority. The principal inſtances, of either ſort, that have been uſually [d] puniſhable by attachment, are chiefly of the following kinds. 1. Thoſe committed by inferior judges and magiſtrates: by acting unjuſtly, oppreſſively, or irregularly, in adminiſtering thoſe portions of juſtice which are intruſted to their diſtribution; or by diſobeying the king's writs iſſuing out of the ſuperior courts, by proceeding in a cauſe after it is put a ſtop to or removed by writ of prohibition, *certiorari*, error *ſuperſedeas*, and the like. For, as the king's ſuperior courts, (and eſpecially the court of king's bench) have a general ſuperintendance over all inferior juriſdictions, any corrupt or iniquitous practices of ſubordinate judges are contempts of that ſuperintending authority, whoſe duty it is to keep them within the bounds of juſtice. 2. Thoſe committed by ſheriffs, bailiffs, gaolers, and other officers of the court: by abuſing the proceſs of the law, or deceiving the parties, by any acts of oppreſſion, extortion, colluſive behaviour, or culpable neglect of duty. 3. Thoſe committed by attorneys and ſolicitors, who are alſo officers of the reſpective courts: by groſs inſtances of fraud and corruption, injuſtice to their clients, or other diſhoneſt practice. For the mal-practice of the officers reflects ſome diſhonour on their employers: and, if frequent or unpuniſhed, creates among the people a diſguſt againſt the courts themſelves. 4. Thoſe committed by jurymen, in collateral matters relating to the diſcharge of their office: ſuch as making default, when ſummoned; refuſing to be ſworn, or to give any verdict; eating or drinking without the leave of the court, and eſpecially at the coſt of either party; and other miſbehaviours or irregularities of a ſimilar kind: but not in the mere exerciſe of their judicial capacities, as by giving a falſe or erroneous verdict. 5. Thoſe committed by witneſſes: by making default when ſummoned, refuſing to be ſworn or examined, or prevaricating in their evidence when ſworn. 6. Thoſe committed by parties to any ſuit or proceeding before the court: as by diſobedience to any

[d] 2 Hawk. P. C. 142, &c.

rule

rule or order, made in the progress of a cause; by non-payment of costs awarded by the court upon a motion; or by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination [e]. Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution (*q*) for the benefit of the injured party; though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon (*r*). And, upon a similar principle, obedience to any rule of court may also by statute 10 Geo. III. c. 50. be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any other persons under the degree of a peer: and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like [f]; or when they import a disobedience to the king's great prerogative writs, of prohibition, *habeas corpus* [g], and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any

[e] See Vol. III. pag. 17.

[f] Styl. 227. 2 Hawk. P. C. 152. Cro. Jac. 419. Salk. 586.

[g] 4 Burr. 632. Lords Journ. 7 Febr. 1757.

(*q*) [Rex *v*. Stokes, Cowp. 136. Trin. term, 14 Geo. III. B. R.]

(*r*) [Rex *v*. Stokes, Mich. 23 Geo. II. K. B. cited in the above case.]

thing in ſhort that demonſtrates a groſs want of that regard and reſpect, which when once courts of juſtice are deprived of, their authority (ſo neceſſary for the good order of the kingdom) is entirely loſt among the people.

THE proceſs of attachment, for theſe and the like contempts, muſt neceſſarily be as antient as the laws themſelves. For laws, without a competent authority to ſecure their adminiſtration from diſobedience and contempt, would be vain and nugatory. A power therefore in the ſupreme courts of juſtice to ſuppreſs ſuch contempts, by an immediate attachment of the offender, reſults from the firſt principles of judicial eſtabliſhments, and muſt be an inſeparable attendant upon every ſuperior tribunal. Accordingly we find it actually exerciſed, as early as the annals of our law extend. And, though a very learned author [h] ſeems inclinable to derive this proceſs from the ſtatute of Weſtm. 2. 13 Edw. I. c. 39. (which ordains, that in caſe the proceſs of the king's courts be *reſiſted* by the power of any great man, the ſheriff ſhall chaſtiſe the reſiſters by impriſonment, "*a qua non-deliberentur ſine ſpeciali praecepto domini regis*:" and if the ſheriff himſelf be reſiſted, he ſhall certify to the courts the names of the principal offenders, their aiders, conſenters, commanders, and favourers, and by a ſpecial writ judicial they ſhall be *attached* by their bodies to appear before the court, and if they be convicted thereof they ſhall be puniſhed at the king's pleaſure, without any interfering by any other perſon whatſoever) yet he afterwards more juſtly concludes, that it is a part of the *law of the land*; and, as ſuch, is *confirmed* by the ſtatute of *magna carta*.

IF the contempt be committed in the face of the court, the offender may be inſtantly apprehended and impriſoned, at the diſcretion of the judges [j], without any farther proof or examination. But in matters that ariſe at a diſtance, and of which the court cannot have ſo perfect a knowlege, unleſs by the confeſſion of the party or the teſtimony of others, if the judges upon *affidavit* ſee ſufficient ground to ſuſpect that a

[h] Gilb. Hiſt. C. P. ch 3.

[j] Staundf. P. C. 73. *b*.

contempt

contempt has been committed, they either make a rule on the suspected party to shew cause why an attachment should not issue against him [i]; or, in very flagrant instances of contempt, the attachment issues in the first instance [k]; as it also does, if no sufficient cause be shewn to discharge, and thereupon the court confirms and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days [l]: and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out [m]. If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury [n]. If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment [o]. If the contempt be of such a nature, that, when the fact is once acknowleged, the court can receive no farther information by interrogatories than it is already possessed of, (as in the case of a *rescous* [p]) the defendant may be admitted to make such simple acknowlegement, and receive his judgment, without answering to any interrogatories: but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

It cannot have escaped the attention of the reader, that this method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the

i Styl. 277.
k Salk. 84. Stra. 185. 564.
l 6 Mod. 73.
m Stra. 444.
n 6 Mod. 73.
o Cro. Car, 146.
p The king *v.* Elkins. M. 8 Geo. III. B. R.

common law in any other instance[q]; and seems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a process of contempt; acting only *in personam* and not *in rem*. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely antient[r], and has in more modern times been recognized, approved, and confirmed by several express acts of parliament[s], so the method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity[t], and by long and immemorial usage is now become the law of the land.

q See Vol. III. pag. 100, 101.

r Yearb. 20 Hen. VI. 37. 22 Edw. IV. 29.

s Stat. 43 Eliz. c. 6. §. 3. 13 Car. II. st. 2. c. 2. §. 4. 9 & 10 W. III. c. 15. 12 Ann. st. 2. c. 15. §. 5.

t M. 5 Edw. IV. rot. 75. cited in Rast. Ent. 268. pl. 5.

CHAPTER THE TWENTY-FIRST.

OF ARRESTS.

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order: *viz.* 1. Arrest; 2. Commitment and bail; 3. Prosecution; 4. Process; 5. Arraignment, and it's incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it's consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution: all which will be discussed in the subsequent part of this book.

FIRST then, of an *arrest:* which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases: but no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken. And, in general, an arrest may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private person also without warrant: 4. By an hue and cry.

1. A WARRANT may be granted in extraordinary cases by the privy council, or secretaries of state[a]; but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence; in order to compel the person accused to appear before them[b]: for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke indeed[c] hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others[d] held to be grounded rather upon connivance, than the express rule of law; though now by long custom established. A doctrine, which would in most cases give a loose to felons to escape without punishment; and therefore sir Matthew Hale hath combated it with invincible authority, and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*[e]; and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed[f]. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the

a 1 Lord Raym. 65.
b 2 Hawk. P. C. 84.
c 4 Inst. 176.
d 2 Hawk. P. C. 84.
e 2 Hal. P. C. 108.
f *Ibid.* 110.

consta-

constable, or other peace officer, (or, it may be, to any private person by name [g]) requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant [h]. A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it's uncertainty [i]; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which it's authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact *no* warrant at all; for it will not justify the officer who acts under it [k]; whereas a warrant, properly penned, (even though the magistrate who issues it should exceed his jurisdiction) will, by statute 24 Geo. II. c. 44. at all events indemnify the officer, who executes the same ministerially. And, when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of king's bench extends all over the kingdom: and is *teste'd*, or *dated*, *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there.

g Salk. 176.

h 2 Hawk. P. C. 85.

i 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

k A practice had obtained in the secretaries office ever since the restoration, grounded on some clauses in the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers and publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued, in every reign, and under every administration, except the four last years of queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers, and publishers of a certain seditious libel, it's validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of Money *v.* Leach. *Trin.* 5 *Geo. III. B. R.* After which, the issuing of such general warrants was declared illegal by a vote of the house of commons. (Com. Journ. 22 Apr. 1766.)

there. Formerly, regularly ſpeaking, there ought to have been a freſh warrant in every freſh county; but the practice of backing warrants had long prevailed without law, and was at laſt authoriſed by ſtatutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55. And now, by ſtatute 13 Geo. III. c. 31. any warrant for apprehending an Engliſh offender, who may have eſcaped into Scotland, and *vice verſa*, may be endorſed and executed by the local magiſtrates, and the offender conveyed back to that part of the united kingdoms, in which ſuch offence was committed.

2. ARRESTS by *officers, without warrant*, may be executed 1. By a juſtice of the peace; who may himſelf apprehend, or cauſe to be apprehended, by word only, any perſon committing a felony or breach of the peace in his preſence[l]. 2. The ſheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The conſtable, of whoſe office we formerly ſpoke[m], hath great original and inherent authority with regard to arreſts. He may, without warrant, arreſt any one for a breach of the peace, committed in his view, and carry him before a juſtice of the peace. And, in caſe of felony *actually* committed (*s*), or a dangerous wounding whereby felony is like to enſue, he may upon probable ſuſpicion arreſt the felon; and for that purpoſe is authoriſed (as upon a juſtice's warrant) to break open doors, and even to kill the felon if he cannot otherwiſe be taken; and, if he or his aſſiſtants be killed in attempting ſuch arreſt, it is murder in all concerned[n]. 5. Watchmen, either thoſe appointed by the ſtatute of Wincheſter, 13 Edw. I. c. 4. to keep watch and ward in all towns from ſunſetting to ſunriſing, or ſuch as are mere aſſiſtants to the conſtable, may *virtute officii* arreſt all offenders, and particularly nightwalkers, and commit them to cuſtody till the morning[o].

[l] 1 Hal. P. C. 86.
[m] See Vol. I. pag. 355.
[n] 2 Hal. P. C. 88—96.
[o] *Ibid.* 98.

(*s*) [In the caſe of Samuel againſt Payne and others, Dougl. 345. it was adjudged in the K. B. that a *peace-officer* may juſtify an arreſt on a reaſonable *charge* of felony, without a *warrant*, although it ſhould afterwards appear that *no felony had been committed*; but a private individual cannot.]

3. ANY

3. Any private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon; on pain of fine and imprisonment, if he escapes through the negligence of the standers-by [p]. And they may justify breaking open doors upon following such felon: and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such arrest, it is murder [q]. Upon probable suspicion also a private person may arrest the felon, or other person so suspected [r]. But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more [s]. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an *hue* and *cry* raised upon a felony committed. An hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another [t]. It is also mentioned by statute Westm. 1. 3 Edw. I. c. 9. and 4 Edw. I. *de officio coronatoris*. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1 & 4. which directs, that from thenceforth every country shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the

p 2 Hawk. P. C. 74.

q 2 Hal. P. C. 77.

r Stat. 30 Geo. II. c. 24.

s 2 Hal. P. C. 82, 83.

t Bracton. *l.* 3. *tr.* 2. *c.* 1. §. 1. Mirr. c. 2. §. 6.

towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And, that such hue and cry may more effectually be made, the hundred is bound by the same statute, c. 3. to answer for all robberies therein committed, unless they take the felon; which is the foundation of an action against the hundred [u], in case of any loss by robbery. By statute 27 Eliz. c. 13. no hue and cry is sufficient, unless made with both horsemen and footmen. And by statute 8 Geo. II. c. 16. the constable or like officer, refusing or neglecting to make hue and cry, forfeits 5 *l*: and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes. An institution, which hath long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century; which is said to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts [w]. Hue and cry [x] may be raised either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace. But if a man wantonly or maliciously raises an hue and cry, without cause, he shall be severely punished as a disturber of the public peace [y].

IN order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers acts of parliament. The statute

u See Vol. III. pag. 161.

w Mod. Un. Hist. vi. 383. vii. 156.

x 2 Hal. P. C. 100—104.

y 1 Hawk. P. C. 75.

4 & 5 W. & M. c. 8. enacts, that ſuch as apprehend a highwayman, and proſecute him to conviction, ſhall receive a reward of 40 *l* from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the ſheriff of the county; beſides the horſe, furniture, arms, money, and other goods taken upon the perſon of ſuch robber; with a reſervation of the right of any perſon from whom the ſame may have been ſtolen: to which the ſtatute 8 Geo. II. c. 16. ſuperadds 10 *l*, to be paid by the hundred indemnified by ſuch taking. By ſtatutes 6 & 7 W. III. c. 17. and 15 Geo. II. c. 28. perſons apprehending and convicting any offender againſt thoſe ſtatutes, reſpecting the coinage, ſhall (in caſe the offence be treaſon or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By ſtatute 10 & 11 W. III. c. 23. any perſon apprehending and proſecuting to conviction a felon guilty of burglary, houſebreaking, horſeſtealing, or private larciny to the value of 5 *s*, from any ſhop, warehouſe, coach-houſe, or ſtable, ſhall be excuſed from all pariſh offices. And by ſtatute 5 Ann. c. 31. any perſon ſo apprehending and proſecuting a burglar, or felonious houſebreaker, (or, if killed in the attempt, his executors) ſhall be entitled to a reward of 40 *l*[z]. By ſtatute 6 Geo. I. c. 23. perſons diſcovering, apprehending, and proſecuting to conviction, any perſon taking reward for helping others to their ſtolen goods, ſhall be entitled to forty pounds. By ſtatute 14 Geo. II. c. 6. explained by 15 Geo. II. c. 34. any perſon apprehending and proſecuting to conviction ſuch as ſteal, or kill with intent to ſteal, any ſheep or other cattle ſpecified in the latter of the ſaid acts, ſhall for every ſuch conviction receive a reward of ten pounds. Laſtly, by ſtatute 16 Geo. II. c. 15. and 8 Geo. III. c. 15. perſons diſcovering, apprehending, and convicting, felons and others being found at large during the term for which they are ordered to be tranſported, ſhall receive a reward of twenty pounds.

z The ſtatutes 4 & 5 W. & M. c. 8. 6 & 7 W. III. c. 17. and 5 Ann. c. 31. (together with 3 Geo. I. c. 15. §. 4. which directs the method of re-imburſing the ſheriffs) are extended to the county palatine of Durham, by Stat. 14 Geo. III. c. 46.

CHAPTER THE TWENTY-SECOND.

OF COMMITMENT AND BAIL.

WHEN a delinquent is arreſted by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a juſtice of the peace: and how he is there to be treated, I ſhall next ſhew, under the ſecond head, of *commitment* and *bail*.

THE juſtice, before whom ſuch priſoner is brought, is bound immediately to examine the circumſtances of the crime alleged: and to this end by ſtatute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of ſuch priſoner, and the information of thoſe who bring him: which, Mr. Lambard obſerves[a], was the firſt warrant given for the examination of a felon in the Engliſh law. For, at the common law, *nemo tenebatur prodere ſeipſum:* and his fault was not to be wrung out of himſelf, but rather to be diſcovered by other means, and other men. If upon this inquiry it manifeſtly appears, either that no ſuch crime was committed, or that the ſuſpicion entertained of the priſoner was wholly groundleſs, in ſuch caſes only it is lawful totally to diſcharge him. Otherwiſe he muſt either be committed to priſon, or give bail; that is, put in ſecurities for his appearance, to anſwer the charge againſt him. This commitment therefore being only for ſafe cuſtody, wherever bail will anſwer the ſame intention, it ought to be taken; as in moſt of the inferior crimes: but in felonies, and other offences of a capi-

[a] *Eirenarch.* b. 2. c. 7. See pag. 357.

tal

tal nature, no bail can be a ſecurity equivalent to the actual cuſtody of the perſon. For what is there that a man may not be induced to forfeit, to ſave his own life? and what ſatisfaction or indemnity is it to the public, to ſeize the effects of them who have bailed a murderer, if the murderer himſelf be ſuffered to eſcape with impunity? Upon a principle ſimilar to which, the Athenian magiſtrates, when they took a ſolemn oath, never to keep a citizen in bonds that could give three ſureties of the ſame quality with himſelf, did it with an exception to ſuch as had embezzled the public money, or been guilty of treaſonable practices [b]. What the nature of bail is, hath been ſhewn in the preceding book [c], *viz.* a delivery or bailment, of a perſon to his ſureties, upon their giving (together with himſelf) ſufficient ſecurity for his appearance: he being ſuppoſed to continue in their friendly cuſtody, inſtead of going to gaol. In civil caſes we have ſeen that every defendant is bailable; but in criminal matters it is otherwiſe. Let us therefore inquire, in what caſes the party accuſed ought, or ought not, to be admitted to bail.

AND, firſt, to refuſe or delay to bail any perſon bailable, is an offence againſt the liberty of the ſubject, in any magiſtrate, by the common law [d], as well as by the ſtatute Weſtm. 1. 3 Edw. I. c. 15. and the *habeas corpus* act, 31 Car. II. c. 2. And, leſt the intention of the law ſhould be fruſtrated by the juſtices requiring bail to greater amount than the nature of the caſe demands, it is expreſsly declared by ſtatute 1 W. & M. ſt. 2. c. 1. that exceſſive bail ought not to be required; though what bail ſhall be called exceſſive, muſt be left to the courts, on conſidering the circumſtances of the caſe, to determine. And, on the other hand, if the magiſtrate takes inſufficient bail, he is liable to be fined, if the criminal doth not appear [e]. Bail may be taken either in court, or in ſome particular caſes by the ſheriff, coroner, or other magiſtrate; but moſt uſually by the juſtices of the peace. Regularly, in all offences either againſt the common

[b] Pott. Antiq. b. 1. c. 18.

[c] See Vol. III. pag. 290.

[d] 2 Hawk. P. C. 90.

[e] *Ibid.* 89.

law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament[f]. In order therefore more precisely to ascertain what offences *are* bailable,

Let us next see, who may *not* be admitted to bail, or, what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences: for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given, *viz.* the body of the accused; in order to insure that justice shall be done upon him, if guilty. Such persons therefore, as the author of the mirror observes[g], have no other sureties but the four walls of the prison. By the antient common law, before[h] and since[i] the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1. 3 Edw. I. c. 15. takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI. c. 9. and 1 & 2 Ph. & Mar. c. 13. give farther regulations in this matter: and upon the whole we may collect[k], that no justice of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Persons outlawed: 6. Such as have abjured the realm: 7. Ap-

[f] 2 Hal. P. C. 127.

[g] c. 2. §. 24.

[h] 2 Inst. 189.

[i] *In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio, ubi ad terrorem aliter statutum est.* (Glanv. *l.* 14. *c.* 1.)

[k] 2 Inst. 186. 2 Hal. P. C. 129.

provers,

provers, of whom we ſhall ſpeak in a ſubſequent chapter, and perſons by them accuſed: 8. Perſons taken with the mainour, or in the fact of felony: 9. Perſons charged with arſon: 10. Excommunicated perſons, taken by writ *de excommunicato capiendo*: all which are clearly not admiſſible to bail by the juſtices. Others are of a dubious nature, as, 11. Thieves openly defamed and known: 12. Perſons charged with other felonies, or manifeſt and enormous offences, not being of good fame: and, 13. Acceſſories to felony, that labour under the ſame want of reputation. Theſe ſeem to be in the diſcretion of the juſtices, whether bailable or not. The laſt claſs are ſuch as *muſt* be bailed upon offering ſufficient ſurety; as, 14. Perſons of good fame, charged with a bare ſuſpicion of manſlaughter, or other inferior homicide: 15. Such perſons, being charged with petit larciny, or any felony not before ſpecified: or, 16. With being acceſſory to any felony. Laſtly, it is agreed that the court[l] of king's bench (or any judge[m] thereof in time of vacation) may bail for any crime whatſoever, be it treaſon[n], murder[o], or any other offence, according to the circumſtance of the caſe. And herein the wiſdom of the law is very manifeſt. To allow bail to be taken commonly for ſuch enormous crimes, would greatly tend to elude the public juſtice: and yet there are caſes, though they rarely happen, in which it would be hard and unjuſt to confine a man in priſon, though accuſed even of the greateſt offence. The law has therefore provided one court, and only one, which has a diſcretionary power of bailing in any caſe: except only, even to this high juriſdiction, and of courſe to all inferior ones, ſuch perſons as are committed by either houſe of parliament, ſo long as the ſeſ-

l 2 Inſt. 189. Latch. 12. Vaugh. 157. Comb. 111. 298. 1 Comyns Dig. 495.

m Skin. 683. Salk. 105. Stra. 911. 1 Comyns Dig. 497.

n In the reign of queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treaſon by any of the queen's privy council. (1 Anderſ. 298.)

o *In omnibus placitis de felonia ſolet accuſatus per plegios dimitti, praeterquam in placito de homicidio.* (Glan. *l.* 14. *c.* 1.) *Sciendum tamen quod, in hoc placito, non ſolet accuſatus per plegios dimitti, niſi ex regiae poteſtatis beneficio.* (*Ibid. c.* 3.)

ſion laſts; or ſuch as are committed for contempts by any of the king's ſuperior courts of juſtice [p].

UPON the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the juſtice, or warrant under his hand and ſeal, containing the cauſe of his commitment; there to abide till delivered by due courſe of law [q]. But this impriſonment, as has been ſaid, is only for ſafe cuſtody, and not for puniſhment: therefore, in this dubious interval between the commitment and trial, a priſoner ought to be uſed with the utmoſt humanity; and neither be loaded with needleſs fetters, or ſubjected to other hardſhips than ſuch as are abſolutely requiſite for the purpoſe of confinement only; though, what are ſo requiſite, muſt too often be left to the diſcretion of the gaolers; who are frequently a mercileſs race of men, and, by being converſant in ſcenes of miſery, ſteeled againſt any tender ſenſation. Yet the law (as formerly held) would not juſtify them in fettering a priſoner, unleſs where he was unruly, or had attempted to eſcape [r]: this being the humane language of our antient lawgivers [s], "*cuſtodes poenam ſibi commiſſorum non augeant, nec eos torqueant; ſed omni ſaevitia remota, pietateque adhibita, judicia debite exequantur.*"

[p] Staundf. P. C. 73. *b*.
[q] 2 Hal. P. C. 122.
[r] 2 Inſt. 381. 3 Inſt. 34.
[s] Flet. *l*. 1. *c*. 26.

CHAPTER THE TWENTY-THIRD.

OF THE SEVERAL MODES OF PROSECUTION.

THE next ſtep towards the puniſhment of offenders is their proſecution, or the manner of their formal accuſation. And this is either upon a previous finding of the fact by an inqueſt or grand jury; or without ſuch previous finding. The former way is either by *preſentment*, or *indictment*.

I. A PRESENTMENT, *generally* taken, is a very comprehenſive term; including not only preſentments properly ſo called, but alſo inquiſitions of office, and indictments by a grand jury. A preſentment, *properly* ſpeaking, is the notice taken by a grand jury of any offence from their own knowlege or obſervation [a], without any bill of indictment laid before them at the ſuit of the king. As, the preſentment of a nuſance, a libel, and the like; upon which the officer of the court muſt afterwards frame an indictment [b], before the party preſented can be put to anſwer it. An inquiſition of office is the act of a jury, ſummoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of theſe are in themſelves convictions, and cannot afterwards be traverſed or denied; and therefore the inqueſt, or jury, ought to hear all that can be alleged on both ſides. Of this nature are all inquiſitions of *felo de ſe*; of flight in perſons accuſed of felony; of deodands, and the like; and preſentments of petty offences in the ſheriff's tourn or court-leet, whereupon the preſiding officer may ſet a fine. Other inquiſitions may be afterwards traverſed and examined; as particularly the coroner's inquiſi-

[a] Lamb. *Eirenarch. l.* 4. *c.* 5. [b] 2 Inſt. 739.

tion of the death of a man, when it finds any one guilty of homicide: for in ſuch caſes the offender ſo preſented muſt be arraigned upon this inquiſition, and may diſpute the truth of it; which brings it to a kind of indictment, the moſt uſual and effectual means of proſecution, and into which we will therefore inquire a little more minutely.

II. AN *indictment*[c] is a written accuſation of one or more perſons of a crime or miſdemeſnor, preferred to, and preſented upon oath by, a grand jury. To this end the ſheriff of every county is bound to return to every ſeſſion of the peace, and every commiſſion of *oyer* and *terminer*, and of general gaol delivery, twenty-four good and lawful men of the county, ſome out of every hundred, to inquire, preſent, do, and execute all thoſe things, which on the part of our lord the king ſhall then and there be commanded them[d]. They ought to be freeholders, but to what amount is uncertain[e]: which ſeems to be *caſus omiſſus*, and as proper to be ſupplied by the legiſlature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now ſettled by ſeveral acts of parliament. However, they are uſually gentlemen of the beſt figure in the county. As many as appear upon this panel are ſworn upon the grand jury, to the amount of twelve at the leaſt, and not more than twenty-three; that twelve may be a majority. Which number, as well as the conſtitution itſelf, we find exactly deſcribed, ſo early as the laws of king Ethelred[f]. "*Exeant ſeniores duodecim thani, et praefectus cum eis, et jurent ſuper ſanctuarium quod eis in manus datur, quod nolint ullum innocentem accuſare, nec aliquem noxium celare.*" In the time of king Richard the firſt (according to Hoveden) the proceſs of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who choſe two more out of every hundred; which two aſſociated to themſelves ten other principal freemen, and thoſe twelve were to anſwer concerning all particulars relating to their own diſtrict. This number was probably

c See appendix. §. 1.
d 2 Hal. P. C. 154.
e *Ibid.* 155.
f Wilk. *LL. Angl. Sax.* 117.

found

found too large and inconvenient; but the traces of this institution ſtill remain, in that ſome of the jury muſt be ſummoned out of every hundred. This grand jury are previouſly inſtructed in the articles of their inquiry, by a charge from the judge who preſides upon the bench. They then withdraw, to ſit and receive indictments, which are preferred to them in the name of the king, but at the ſuit of any private proſecutor; and they are only to hear evidence on behalf of the proſecution: for the finding of an indictment is only in the nature of an inquiry or accuſation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be ſufficient cauſe to call upon the party to anſwer it. A grand jury however ought to be thoroughly perſuaded of the truth of an indictment, ſo far as their evidence goes; and not to reſt ſatisfied merely with remote probabilities: a doctrine, that might be applied to very oppreſſive purpoſes[g].

THE grand jury are ſworn to inquire, only for the body of the county, *pro corpore comitatus;* and therefore they cannot regularly inquire of a fact done out of that county for which they are ſworn, unleſs particularly enabled by act of parliament. And to ſo high a nicety was this matter antiently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, becauſe no complete act of felony was done in any one of them: but by ſtatute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And, by ſtatute 2 Geo. II. c. 21. if the ſtroke or poiſoning be in England, and the death upon the ſea or out of England; or *vice verſa*; the offenders and their acceſſories may be indicted in the county where either the death, poiſoning, or ſtroke ſhall happen. And ſo in ſome other caſes: as particularly, where treaſon is committed out of the realm, it may be inquired of in any county within the realm, as the king ſhall direct, in purſuance of ſtatutes 26 Hen. VIII. c. 13. 33 Hen. VIII. c. 23. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. And counterfeiters, waſhers, or miniſhers

g State Trials. IV. 183.

of the current coin, together with all manner of felons and their acceſſories, may by ſtatute 26 Hen. VIII. c. 6. (confirmed and explained by 34 & 35 Hen. VIII. c. 26. §. 75, 76.) be indicted and tried for thoſe offences, if committed in any part [h] of Wales, before the juſtices of gaol delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at preſent in the county of Hereford or Salop; and not, as it ſhould ſeem, in the county of Cheſter or Monmouth: the one being a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII [i]. Murders alſo, whether committed in England or in foreign parts [k], may by virtue of the ſtatute 33 Hen. VIII. c. 23. be inquired of and tried by the king's ſpecial commiſſion in any ſhire or place in the kingdom. By ſtatute 10 & 11 W. III. c. 25. all robberies and other capital crimes, committed in Newfoundland, may be inquired of and tried in any county in England. Offences againſt the black act, 9 Geo. I. c. 22. may be inquired of and tried in any county of England, at the option of the proſecutor [l]. So felonies in deſtroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by ſtatutes 8 Geo. II. c. 20. and 13 Geo. III. c. 84. be inquired of and tried in any adjacent county. By ſtatute 26 Geo. II. c. 19. plundering or ſtealing from any veſſel in diſtreſs or wrecked, or breaking any ſhip contrary to 12 Ann. ſt. 2. c. 18 [m]. may be proſecuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining Engliſh county: by which is underſtood to be meant ſuch Engliſh county as, by the ſtatute 26 Hen. VIII. above-mentioned, had before a concurrent juriſdiction with the great ſeſſions of felonies committed in Wales [n]. Felonies committed out

h Stra. 533. 8 Mod. 134.

i See Hardr. 66.

k Ely's caſe, at the old bailey, Dec. 1720. Roache's caſe, Dec. 1775.

l So held by all the judges, H. 11. Geo. III. in the caſe of Richard Mortis on a caſe referred from the old bailey.

m See page 244.

n At Shrewſbury ſummer aſſiſes, 1774, Parry and Roberts were convicted of plundering a veſſel which was wrecked on the coaſt of Angleſey. It was moved in arreſt of judgment, that Cheſter and not Salop was the next adjoining Engliſh county. But all the judges (in Mich. 15 Geo. III.) held the proſecution to be regular.

of the realm, in burning or destroying the king's ships, magazines or stores, may by statute 12 Geo. III. c. 24. be inquired of and tried in any county of England, or in the place where the offence is committed. By statute 13 Geo. III. c. 63. misdemesnors committed in India may be tried upon information or indictment in the court of king's bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet if larciny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both[o]. Or, he may be indicted in England for larciny in Scotland, and carrying the goods with him into England, or *vice versa*; or for receiving in one part of the united kingdoms goods that have been stolen in another[p]. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed: for though the carrying away, and keeping of the goods is a continuation of the original taking, and is therefore larciny in the second county, yet it is not a robbery or burglary in that jurisdiction. And if a person be indicted in one county for larciny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with such circumstances, as would have ousted him of his clergy by virtue of any statute made previous to the year 1691[q].

WHEN the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, "not a true bill;" or (which is the better way) "not found;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then

o 1 Hal. P. C. 507.

p Stat. 13 Geo. III. c. 31.

q Stat. 25 Hen. VIII. c. 3. 3 W. & M. c. 9.

endorse upon it, "a true bill;" antiently, "*billa vera.*" The indictment is then said to be found, and the party stands indicted. But to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree[r]. And the indictment, when so found, is publicly delivered into court.

INDICTMENTS must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5. all indictments must set forth the christian name, sirname, and addition of the state and degree, mystery, town, or place, and the county of the offender: and all this to identify his *person*. The *time*, and *place*, are also to be ascertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact[s]. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed[t]: and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence,

r 2 Hal. P. C. 161.
s 2 Hawk. P. C. 435.
t Fost. 249.

offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably, and against his allegiance;" antiently, "*proditorie et contra ligeantiae suae debitum*:" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed" or "slew," the other; which till the late statute was expressed in Latin by the word "*murdravit*[t]." In all indictments for felonies, the adverb "feloniously, *felonice*," must be used; and for burglaries also, *burglariter*," or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcinies also, the words "*felonice cepit et asportavit*, feloniously took and carried "away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then it's dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible[u]. Lastly, in indictments the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larcinies this is necessary, that it may appear whether it be grand or petit larciny; and whether entitled or not to the benefit of clergy: in homicide of all sorts it is necessary; as the weapon with which it is committed is forfeited to the king as a deodand.

THE remaining methods of prosecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these, by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment: as by the

[t] See Vol. III. pag. 321. [u] 5 Rep. 122.

Danish

Daniſh law he might be taken and hanged upon the ſpot, without accuſation or trial [w]. But this proceeding was taken away by ſeveral ſtatutes in the reign of Edward the third [x]: though in Scotland a ſimilar proceſs remains to this day [y]. So that the only ſpecies of proceeding at the ſuit of the king, without a previous indictment or preſentment by a grand jury, now ſeems to be that of *information*.

III. INFORMATIONS are of two ſorts; firſt, thoſe which are partly at the ſuit of the king, and partly at that of a ſubject; and ſecondly, ſuch as are only in the name of the king. The former are uſually brought upon penal ſtatutes, which inflict a penalty upon conviction of the offender, one part to the uſe of the king, and another to the uſe of the informer; and are a ſort of *qui tam* actions, (the nature of which was explained in a former volume [z],) only carried on by a criminal inſtead of a civil proceſs: upon which I ſhall therefore only obſerve, that by the ſtatute 31 Eliz. c. 5. no proſecution upon any penal ſtatute, the ſuit and benefit whereof are limited in part to the king and in part to the proſecutor, can be brought by any common informer after one year is expired ſince the commiſſion of the offence; nor on behalf of the crown after the lapſe of two years longer; nor, where the forfeiture is originally given only to the king, can ſuch proſecution be had after the expiration of two years from the commiſſion of the offence.

THE informations that are exhibited in the name of the king alone, are alſo of two kinds: firſt, thoſe which are truly and properly his own ſuits, and filed *ex officio* by his own immediate officer, the attorney general: ſecondly, thoſe in which, though the king is the nominal proſecutor, yet it is at the relation of ſome private perſon or common informer: and they are filed by the king's coroner and attorney in the court of king's bench, uſually called the maſter of the crown-office, who is for this purpoſe the ſtanding officer of the public. The objects of the king's own proſecutions, filed *ex officio* by his own attorney general, are properly ſuch enor-

w Stiernh. *de jure Sueon. l.* 3. *c.* 5.
x 2 Hal. P. C. 149.
y Lord Kayms. I. 331.
z See Vol. III. pag. 162.

mous miſdemeſnors, as peculiarly tend to diſturb or endanger his government, or to moleſt or affront him in the regular diſcharge of his royal functions. For offences ſo high and dangerous, in the puniſhment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate proſecution, without waiting for any previous application to any other tribunal: which power, thus neceſſary, not only to the eaſe and ſafety, but even to the very exiſtence of the executive magiſtrate, was originally reſerved in the great plan of the Engliſh conſtitution; wherein proviſion is wiſely made for the due preſervation of all it's parts. The objects of the other ſpecies of informations, filed by the maſter of the crown-office upon the complaint or relation of a private ſubject, are any groſs and notorious miſdemeſnors, riots, batteries, libels, and other immoralities of an atrocious kind [a], not peculiarly tending to diſturb the government (for thoſe are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deſerve the moſt public animadverſion. And when an information is filed, either thus, or by the attorney general *ex officio*, it muſt be tried by a petit jury of the county where the offence ariſes: after which, if the defendant be found guilty, the court muſt be reſorted to for his puniſhment.

THERE can be no doubt but that this mode of proſecution, by information (or ſuggeſtion) filed on record by the king's attorney general, or by his coroner or maſter of the crown-office in the court of king's bench, is as antient as the common law itſelf [b]. For as the king was bound to proſecute, or at leaſt to lend the ſanction of his name to a proſecutor, whenever a grand jury informed him upon their oaths that there was a ſufficient ground for inſtituting a criminal ſuit; ſo, when theſe his immediate officers were otherwiſe ſufficiently aſſured that a man had committed a groſs miſdemeſnor, either perſonally againſt the king or his government, or againſt the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a

[a] 2 Hawk. P. C. 260. [b] 1 Show. 118.

ſuggeſtion on record, and to carry on the proſecution in his majeſty's name. But theſe informations (of every kind) are confined by the conſtitutional law to mere miſdemeſnors only: for, wherever any capital offence is charged, the ſame law requires that the accuſation be warranted by the oath of twelve men, before the party ſhall be put to anſwer it. And, as to thoſe offences, in which informations were allowed as well as indictments, ſo long as they were confined to this high and reſpectable juriſdiction, and were carried on in a legal and regular courſe in his majeſty's court of king's bench, the ſubject had no reaſon to complain. The ſame notice was given, the ſame proceſs was iſſued, the ſame pleas were allowed, the ſame trial by jury was had, the ſame judgment was given by the ſame judges, as if the proſecution had originally been by indictment. But when the ſtatute 3 Hen. VII. c. 1. had extended the juriſdiction of the court of ſtar-chamber, the members of which were the ſole judges of the law, the fact, and the penalty; and when the ſtatute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal ſtatute, not extending to life or member, at the aſſiſes or before the juſtices of the peace, who were to hear and determine the ſame according to their own diſcretion; then it was, that the legal and orderly juriſdiction of the court of king's bench fell into diſuſe and oblivion, and Empſon and Dudley (the wicked inſtruments of king Henry VII) by hunting out obſolete penalties, and this tyrannical mode of proſecution, with other oppreſſive devices [c], continually haraſſed the ſubject and ſhamefully enriched the crown. The latter of theſe acts was ſoon indeed repealed by ſtatute 1 Hen. VIII. c. 6. but the court of ſtar-chamber continued in high vigour, and daily increaſing it's authority, for more than a century longer; till finally aboliſhed by ſtatute 16 Car. I. c. 10.

UPON this diſſolution the old common law [d] authority of the court of king's bench, as the *cuſtos morum* of the nation, being found neceſſary to reſide ſomewhere for the peace and good government of the kingdom, was again revived in prac-

[c] 1 And. 157. [d] 5 Mod. 464.

tice [e]. And it is obſervable, that, in the ſame act of parliament which aboliſhed the court of ſtar-chamber, a conviction by information is expreſsly reckoned up, as one of the legal modes of conviction of ſuch perſons as ſhould offend third time againſt the proviſions of that ſtatute [f]. It is true, ſir Matthew Hale, who preſided in this court ſoon after the time of ſuch revival, is ſaid [g] to have been no friend to this method of proſecution: and, if ſo, the reaſon of ſuch his diſlike was probably the ill uſe which the maſter of the crown-office then made of his authority, by permitting the ſubject to be haraſſed with vexatious informations, whenever applied to by any malicious or revengeful proſecutor; rather than his doubt of their legality, or propriety upon urgent occaſions [h]. For the power of filing informations, without any control, then reſided in the breaſt of the maſter: and, being filed in the name of the king, they ſubjected the proſecutor to no coſts, though on trial they proved to be groundleſs. This oppreſſive uſe of them, in the times preceding the revolution, occaſioned a ſtruggle, ſoon after the acceſſion of king William [i], to procure a declaration of their illegality by the judgment of the court of king's bench. But ſir John Holt, who then preſided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by ſtatute 4 & 5 W. & M. c. 18. which enacts, that the clerk of the crown ſhall not file any information without expreſs direction from the court of king's bench: and that every proſecutor, permitted to promote ſuch information, ſhall give ſecurity by a recognizance of twenty pounds (which now ſeems to be too ſmall a ſum) to proſecute the ſame with effect; and to pay coſts to the defendant, in caſe he be acquitted thereon, unleſs the judge, who tries the information, ſhall certify there was reaſonable cauſe for filing it; and, at all events, to pay coſts, unleſs

e Styl. Rep. 217. 245. Styl. pract. Reg. *tit.* Information. pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152.

f Stat. 16 Car. I. c. 10. §. 6.

g 5 Mod. 460.

h 1 Saund. 301. 1 Sid. 174.

i M. 1 W. & M. 5 Mod. 459. Comb. 141. Far. 361. 1 Show. 106.

the

the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations than those which are exhibited by the master of the crown-office: and, consequently, informations at the king's own suit, filed by his attorney general, are no way restrained thereby.

THERE is one species of informations, still farther regulated by statute 9 Ann. c. 20. *viz.* those in the nature of a writ of *quo warranto*; which was shewn, in the preceding volume[k], to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the antient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney general: being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding.

THESE are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal*.

IV. AN appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit, at the time of it's first commencement[l]. An appeal therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particnlar injury suffered, rather than for the offence against the public. As this method of prosecution is still in force, I cannot omit to mention it: but as it is very little in use, on account of the

k See Vol. III. pag. 262.

l It is derived from the French, "*appeller*," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "appeal" in English.

great

great nicety required in conducting it, I ſhall treat of it very briefly; referring the ſtudent for more particulars to other more voluminous compilations [m].

THIS private proceſs, for the puniſhment of public crimes, had probably its original in thoſe times when a private pecuniary ſatisfaction, called a *weregild*, was conſtantly paid to the party injured, or his relations, to expiate enormous offences. This was a cuſtom derived to us, in common with other northern nations [n], from our anceſtors, the antient Germans; among whom, according to Tacitus [o], "*luitur homicidium certo armentorum ac pecorum numero; reci-" "pitque ſatisfactionem univerſa domus* [p]." In the ſame manner by the Iriſh Brehon law, in caſe of murder, the Brehon or judge was uſed to compound between the murderer and the friends of the deceaſed who proſecuted him, by cauſing the malefactor to give unto them, or to the child or wife of him that was ſlain, a recompenſe which they called an *eriach* [q]. And thus we find in our Saxon laws (particularly thoſe of king Athelſtan [r]) the ſeveral weregilds for homicide eſtabliſhed in progreſſive order, from the death of the ceorl or peaſant, up to that of the king himſelf [s]. And in the laws of king Henry I [t], we have an account of what other offences were then redeemable by weregild, and what were not ſo [u]. As therefore, during the continuance of this cuſtom, a proceſs was certainly given, for recovering the weregild by the party to whom it was due; it ſeems that, when

m 2 Hawk. P. C. ch. 23.

n Stiernh. *de jure Sueon. l.* 3. *c.* 4.

o *de M. G. c.* 21.

p And in another place. (*c.* 12.) "*Delictis, pro modo poenarum, equorum* "*pecorumque numero convicti mulctantur.* "*Pars mulctae regi vel civitati; pars ipſi* "*qui vindicatur, vel propinquis ejus, ex-* "*ſolvitur.*"

q Spenſer's ſtate of Ireland, pag. 1513. *edit.* Hughes.

r *Judic. Civit. Lund.* Wilk. 71.

s The weregild of a ceorl was 266 thryſmas, that of the king 30,000; each thryſma being equal to about a ſhilling of our preſent money. The weregild of a ſubject was paid entirely to the relations of the party ſlain; but that of the king was divided; one half being paid to the public, the other to the royal family.

t c. 12.

u In Turkey this principle is ſtill carried ſo far, that even murder is never proſecuted by the officers of the government, as with us. It is the buſineſs of the next relations, and them only, to revenge the ſlaughter of their kinſmen: and if they rather chooſe (as they generally do) to compound the matter for money, nothing more is ſaid about it. (Lady M. W. Montague, lett. 42.)

these

these offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence.

BUT, though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual, yet it also was antiently permitted, that any subject might appeal another subject of high-treason, either in the courts of common law [w], or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battel awarded in the court of chivalry, on such an appeal of treason [x]: but that in the first was *virtually* abolished [y] by the statutes 5 Edw. III. c. 9. and 25 Edw. III. c. 24. and in the second *expressly* by statute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

AN appeal of *felony* may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are *larciny*, *rape*, and *arson*. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burnt, may institute this private process. The only crime against one's relation, for which an appeal can be brought, is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confined, by an ordinance of king Henry the first, to the four nearest degrees of blood [z]. It is given to the wife, on account of the loss of her husband: therefore, if she marries again, before or pending her appeal, it is lost and gone; or, if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was the

w Britt. c. 22.

x By Donald lord Rae against David Ramsey. (Rushw. vol. 2. part. 2. pag. 112.)

y 1 Hal. P. C. 349.

z Mirr. c. 2. §. 7.

next heir by the course of the common law, at the time of the killing of the anceftor. But this rule has three exceptions: 1. If the perfon killed leaves an innocent wife, fhe only, and not the heir, fhall have the appeal: 2. If there be no wife, and the heir be accufed of the murder, the perfon, who next to him would have been heir male, fhall bring the appeal: 3. If the wife kills her hufband, the heir may appeal her of the death. And, by the ftatute of Gloucefter, 6 Edw. I. c. 9. all appeals of death muft be fued within a year and a day after the completion of the felony by the death of the party: which feems to be only declaratory of the old common law; for in the Gothic conftitutions we find the fame "*praefcriptio annalis, quae currit adverfus actorem, fi de* "*homicidia ei non conftet intra annum a caede facta, nec quen-* "*quam interea arguat et accufet*[a]."

THESE appeals may be brought, previous to any indictment; and if the appellee be acquitted thereon, he cannot be afterwards indicted for the fame offence. In like manner as by the old Gothic conftitution, if any offender gained a verdict in his favour, when profecuted by the party injured, he was alfo underftood to be acquitted of any crown profecution for the fame offence[b]: but, on the contrary, if he made his peace with the king, ftill he might be profecuted at the fuit of the party. And fo, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, ftill he ought not (in ftrictnefs) to go at large, but be imprifoned or let to bail till the year and day be paft, by virtue of the ftatute 3 Hen. VII. c. 1. in order to be forthcoming to anfwer any appeal for the fame felony, not having as yet been punifhed for it: though, if he hath been found guilty of manflaughter on an indictment, and hath had the benefit of clergy, and fuffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law, "that *nemo bis punitur pro eodem delicto.*" Before this ftatute was made, it was not ufual to indict a man for homicide within the time limited for appeals; which produced very great inconvenience, of which more hereafter[c].

[a] Stiernh. *de jure Goth. l.* 3. *c.* 4.
[b] *Ibid. l.* 1. *c.* 5.
[c] See pag. 335.

If the appellee be acquitted, the appellor (by virtue of the ſtatute of Weſtm. 2. 13 Edw. I. c. 12.) ſhall ſuffer one year's impriſonment, and pay a fine to the king, beſides reſtitution of damages to the party for the impriſonment and infamy which he has ſuſtained: and, if the appellor be incapable to make reſtitution, his abettors ſhall do it for him, and alſo be liable to impriſonment. This proviſion, as was foreſeen by the author of Fleta [d], proved a great diſcouragement to appeals; ſo that thenceforward they ceaſed to be in common uſe.

If the appellee be found guilty, he ſhall ſuffer the ſame judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the ſuit of the king, the king may pardon and remit the execution; on an appeal, which is at the ſuit of a private ſubject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery [e]. In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority [f]. And the antient uſage was, ſo late as Henry the fourth's time, that all the relations of the ſlain ſhould drag the appellee to the place of execution [g]: a cuſtom, founded upon that ſavage ſpirit of family reſentment, which prevailed univerſally through Europe after the irruption of the northern nations, and is peculiarly attended to in their ſeveral codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated ſtate [h]. However, the puniſhment of the offender may be remitted and diſcharged by the concurrence of all parties intereſted; and as the king by his pardon may fruſtrate an indictment, ſo the appellant by his releaſe may

d *l.* 1. *c.* 34. §. 48.
e 2 Hawk. P. C. 392.
f *LL. Edm.* §. 3.
g *M.* 11 *Hen. IV.* 12. 3 Inſt. 131.
h Robertſon. Cha. V. i. 45.

discharge an appeal[i]: "*nam quilibet potest renunciare juri pro se introducto.*"

THESE are the several methods of prosecution instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by either information or appeal.

i 1 Hal. P. C. 9.

observed[e]: so that though antiently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him[f]; because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder[g], unless it happens in the endeavour to apprehend him[h]. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment.

THUS much for process to bring in the offender after indictment found: during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius*: or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those

e See pag. 178.
f Mirr. c. 4. §. 4. Co. Litt. 128.
g 1 Hal. P. C. 497.
h Bracton. *fol.* 125.

counties

counties or places where the process of the inferior judges will not reach him[i]. Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below[k].

At this stage of prosecution also it is, that indictments found by the grand jury against a peer must in consequence of a writ of *certiorari* be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

i 2 Hal. P. C. 210.

k 2 Hawk. P. C. 287. 4 Burr. 749.

CHAPTER THE TWENTY-FIFTH.

OF ARRAIGNMENT AND IT'S INCIDENTS.

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment [a]. The prisoner is to be called to the bar by his name; and it is laid down in our antient book [b], that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, *A. D.* 1722. a difference was taken between the time of arraignment, and the time of trial: and accordingly the prisoner stood at the bar in chains during the time of his arraignment [c].

[a] 2 Hal. P. C. 216.

[b] Bract. *l.* 3. *de coron. c.* 18. §. 3. Mirr. *c.* 5. *sect.* 1. §. 54. Flet. *l.* 1. *c.* 31. §. 1. Brit. *c.* 5. Staundf. P. C. 78. 3 Inst. 34. Kel. 10. 2 Hal. P. C. 219. 2 Hawk. P. C. 308.

[c] State Trials. VI. 230.

WHEN

WHEN he is brought to the bar, he is called upon by name to hold up his hand: which though it may ſeem a trifling circumſtance, yet is of this importance, that by the holding up of his hand *conſtat de perſona*, and he owns himſelf to be of that name by which he is called [d]. However, it is not an indiſpenſable ceremony; for, being calculated merely for the purpoſe of identifying the perſon, any other acknowlegment will anſwer the purpoſe as well: therefore, if the priſoner obſtinately and contemptuouſly refuſes to hold up his hand, but confeſſes he is the perſon named, it is fully ſufficient [e].

THEN the indictment is to be read to him diſtinctly in the Engliſh tongue, (which was law, even while all other proceedings were in Latin) that he may fully underſtand his charge. After which it is to be demanded of him whether he be guilty of the crime, whereof he ſtands indicted, or not guilty. By the old common law the acceſſory could not be arraigned till the principal was attainted; unleſs he choſe it, for he might waive the benefit of the law: and therefore principal and acceſſory might, and may ſtill, be arraigned, and plead, and alſo be tried together. But otherwiſe, if the principal had never been indicted at all, had ſtood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the acceſſory in any of theſe caſes could not be arraigned: for *non conſtitit* whether any felony was committed or no, till the principal was attainted; and it might ſo happen that the acceſſory ſhould be convicted one day, and the principal acquitted the next, which would be abſurd. However, this abſurdity could only happen, where it was poſſible, that a trial of the principal might be had, ſubſequent to that of the acceſſory: and therefore the law ſtill continues that the acceſſory ſhall not be tried, ſo long as the principal remains liable to be tried hereafter. But by ſtatute

d 2 Hal. P. C. 219.

e Raym. 408.

1 Ann. c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice [f], that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

WHEN a criminal is arraigned, he either *stands mute*, or *confesses* the fact; which circumstances we may call *incidents* to the arraignment; or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But first, let us observe these incidents to the arraignment, of standing mute, or confession.

I. REGULARLY a prisoner is said to stand mute, when, being arraigned for treason or felony, he either, 1. Makes no answer at all: or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3. Upon having pleaded not guilty, refuses to put himself upon the country [g]. If he says nothing, the court ought *ex officio* to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty [h]. But whether judgment of death can be given against such a pri-

[f] Foster. 365, &c.

[g] 2 Hal. P. C. 316.

[h] 2 Hawk. P. C. 327.

soner,

soner, who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined[i].

If he be found to be obstinately mute, (which a prisoner hath been held to be, that hath cut out his own tongue[k]) then, if it be on an indictment of high treason, it hath long been clearly settled that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution[l]. And as in this the highest crime, so also in the lowest species of felony, *viz.* in petit larceny, and in all misdemesnors, standing mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not, by the antient law, looked upon as convicted, so as to receive judgment for the felony; but should, for his obstinacy, have received the terrible sentence of *penance*, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisone*) *forte et dure*.

Before this was pronounced the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger[m]: and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him; even though he was too stubborn to pray it[n]. Thus tender was the law of inflicting this dreadful punishment: but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him, without any distinction of sex or degree. A judgment, which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

The rack, or question, to extort a confession from criminals, is a practice of a different nature: *this* having been only

i 2 Hal. P. C. 317.
k 3 Inst. 178.
l 2 Hawk. P. C. 329. 2 Hal. P. C. 317.
m 2 Hal. P. C. 320.
n 2 Hal. P. C. 321. 2 Hawk. P. C. 332.

used

used to compel a man to put himself upon his trial; *that* being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other ministers of Henry VI, had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London[o]: where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth[p]. But when, upon the assassination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England[q]. It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for it's introduction in the civil law, and it's subsequent adoption by the French and other foreign nations[r]: *viz.* because the laws cannot endure that any man should die upon the evidence of a false, or even a single witness; and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves!—But there needs only to state accurately[s], in order most effectually to expose, this inhuman species of mercy, the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully: though he lived in a state wherein it was

o 3 Inst. 35.

p Barr. 92. 496.

q Rushw. Coll. i. 638.

r *Cod. l.* 9. *t.* 41. *l.* 8. & *t.* 47. *l.* 16. Fortesc. *de LL. Ang. c.* 22.

s The marquis Beccaria, (ch. 16.) in an exquisite piece of raillery, has proposed this problem, with a gravity and precision that are truly mathematical: "the force of the muscles and the sensibility of the nerves of an innocent "person being given, it is required to "find the degree of pain, necessary to "make him confess himself guilty of a "given crime."

usual

usual to torture slaves in order to furnish evidence: "*tamen*, says he, "*illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quaesitor, flectit libido, corrumpit spes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquatur* [t]."

THE English judgment of penance for standing mute [v] was as follows: that the prisoner be remanded to the prison from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more: that he have no sustenance, save only, on the first day, three morsels of the worst bread; and, on the second day, three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet, *till he died*, or (as antiently the judgment ran) *till he answered* [u].

IT hath been doubted whether this punishment subsisted at the common law [w], or was introduced in consequence of the statute Westm. 1. 3 Edw. I. c. 12 [x]. which seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, case, or record, (that hath yet been produced) previous to the reign of Edward I: but there are instances on record in the reign of Henry III [y], where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony [z]. This statute of Edward I directs such persons

t *Pro Sulla.* 28.

v 2 Hal. P. C. 319. 2 Hawk. P. C. 329.

u Britton. c. 4. & 22. Flet. *l.* 1. c. 34. §. 33.

w 2 Inst. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.

x Staundf. P. C. 149. Barr. 82.

y Emlyn on 2 Hal. P. C. 322.

z *Al common ley, avant le statute de West. 1. c. 12. si ascun ust estre appeal, et ust estre mute, ill serra convict de felony.* (*M. 8 Hen. IV. 2.*)

"as

"as will not put themselves upon inquests of felonies before "the judges at the suit of the king, to be put into hard and "strong prison (soient mys en la prisone fort et dure) as those "which refuse to be at the common law of the land." And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, so as to hasten the death of the miserable sufferer: and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the mirror[a] as a species of criminal homicide. It also clearly appears, by a record of 31 Edw. III[b], that the prisoner might then possibly subsist for forty days under this lingering punishment. I should therefore imagine that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edw. III. and 8 Hen. IV. at which last period it first appears upon our books[c]; being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment: and hence I presume it also was, that the duration of the penance was then first[d] altered; and instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure.

THE uncertainty of it's original, the doubts that were conceived of it's legality, and the repugnance of it's theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the antient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have still innocently remained,

a ch. 1. §. 9.
b 6 Rym. 13.
c Yearb. 8 Hen. IV. 12
d *Et fuit dit, que le contraire avoit estre fait devant ces heurs.* (*Ibid.* 2.)

as a monument of the savage rapacity with which the lordly tyrants of feodal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the *lands*, were saved in felony and petit treason; though not the forfeiture of the *goods*; and therefore this lingering punishment was probably introduced, in order to extort a plea; without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it, as in other cases of conviction[e]. And very lately, to the honour of our laws, it hath been enacted by statute 12 Geo. III. c. 20. that every person who, being arraigned for felony or piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same; and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime. And thus much for the demesnor of a prisoner upon his arraignment, by standing mute; which now, in all cases, amounts to a constructive confession.

II. THE other incident to arraignments exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment[f].

BUT there is another species of confession, which we read much of in our antient books, of a far more complicated kind, which is called *approvement*. And that is when a per-

[e] 2 Hawk. P. C. 331.

[f] 2 Hal. P. C. 225.

son,

son, indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices of the same crime, in order to obtain his pardon. In this case he is called an *approver* or prover, *probator*, and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it: and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battel, or by the country; and, if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiae*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, *viz*. the convicting of some other person, and therefore his conviction remains absolute.

But it is purely in the discretion of the court to permit the approver thus to appeal, or not; and, in fact, this course of admitting approvements hath been long disused: for the truth was, as sir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein[g]: though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use. I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the case of coining, robbery, burglary, house-breaking, horse-stealing, and larciny to the value of five shillings from shops, warehouses, stables, and coach-houses, by statutes 4 & 5 W. & M. c. 8.

[g] 2 Hal. P. C. ch. 29. 2 Hawk. P. C. ch. 24.

6 & 7 W. III. c. 17. 10 & 11 W. III. c. 23. and 5 Ann. c. 31. which enact, that, if any ſuch offender, being out of priſon, ſhall diſcover two or more perſons, who have committed the like offences, ſo as they may be convicted thereof; he ſhall in caſe of burglary or houſebreaking receive a reward of 40*l*, and in general be entitled to a pardon of all capital offences, excepting only murder and treaſon; and of them alſo in the caſe of coining[h]. And if any ſuch perſon, having feloniouſly ſtolen any lead, iron, or other metals, ſhall diſcover and convict two offenders of having illegally bought or received the ſame, he ſhall by virtue of ſtatute 29 Geo. II. c. 30. be pardoned for all *ſuch* felonies committed before ſuch diſcovery. It hath alſo been uſual for the juſtices of the peace, by whom any perſons charged with felony are committed to gaol, to admit ſome one of their accomplices to become a witneſs (or, as it is generally termed, king's evidence) againſt his fellows; upon an implied confidence, which the judges of gaol delivery have uſually countenanced and adopted, that if ſuch accomplice makes a full and complete diſcovery of that and of all other felonies to which he is examined by the magiſtrate, and afterwards gives his evidence without prevarication or fraud, he ſhall not himſelf be proſecuted for that or any other previous offence of the ſame degree[i].

h The pardon, for diſcovering offences againſt the coinage act of 15 Geo. II. c. 28. extends only to all *ſuch* offences.

i The King v. Rudd; Mich. 16 Geo. III; on a caſe reſerved from the old bailey, Oct. 1775.

CHAPTER THE TWENTY-SIXTH.

OF PLEA, AND ISSUE.

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

FORMERLY there was another plea, now abrogated, that, of *sanctuary*; which is however necessary to be lightly touched upon, as it may give some light to many parts of our antient law: it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, *viz.* that he abjured the realm, and would depart from thence forthwith, at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in

his

his hand and with all convenient ſpeed, to the port aſſigned, and embarking. For if, during this forty days privilege of ſanctuary, or in his road to the ſea ſide, he was apprehended and arraigned in any court, for this felony, he might plead the privilege of ſanctuary, and had a right to be remanded, if taken out againſt his will[a]. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels[b]. The immunity of theſe privileged places was very much abridged by the ſtatutes 27 Hen. VIII. c. 19. and 32 Hen. VIII. c. 12. And now, by the ſtatute 21 Jac. I. c. 28. all privilege of ſanctuary, and abjuration conſequent thereupon, is utterly taken away and aboliſhed.

FORMERLY alſo the benefit of clergy uſed to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name alſo given to that of ſanctuary[c]. But, as the priſoner upon a trial has a chance to be acquitted, and totally diſcharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction; this courſe is extremely diſadvantageous: and therefore the benefit of clergy is now very rarely pleaded; but, if found requiſite, is prayed by the convict before judgment is paſſed upon him.

I PROCEED therefore to the five ſpecies of pleas, beforementioned.

I. A PLEA to the *juriſdiction*, is where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape at the ſheriff's tourn, or for treaſon at the quarter ſeſſions: in theſe, or ſimilar caſes, he may except to the juriſdiction of the court, without anſwering at all to the crime alleged[d].

II. A DEMURRER to the indictment. This is incident to criminal caſes, as well as civil, when the fact as alleged is

[a] Mirr c. 1. §. 13. 2 Hawk. P. C. 335.
[b] 2 Hawk. P. C. 52.
[c] 2 Hal. P. C. 236.
[d] *Ibid.* 256.

allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held [e], that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others [f], who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shewn it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty [g]. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty: or afterwards in arrest of judgment, when the verdict has established the fact.

III. A PLEA in *abatement* is principally for a *misnosmer*, a wrong name, or a false addition to the prisoner. As, if *James* Allen, *gentleman*, is indicted by the name of *John* Allen, *esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the in-

[e] 2 Hal. P. C. 257.
[f] 2 Hawk. P. C. 334.
[g] 2 Hal. P. C. 225.

dictment ſhall be abated, as writs or declarations may be in civil actions; of which we ſpoke at large in the preceding volume [h]. But, in the end, there is little advantage accruing to the priſoner by means of theſe dilatory pleas; becauſe if the exception be allowed, a new bill of indictment may be framed, according to what the priſoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, muſt at the ſame time ſhew how it may be amended. Let us therefore next conſider a more ſubſtantial kind of plea, *viz.*

IV. SPECIAL pleas in *bar;* which go to the merits of the indictment, and give a reaſon why the priſoner ought not to anſwer it at all, nor put himſelf upon his trial for the crime alleged. Theſe are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal [i]: but theſe are applicable to both appeals and indictments.

1. FIRST, the plea of *auterfoits acquit*, or a former acquittal, is grounded on this univerſal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the ſame offence. And hence it is allowed as a conſequence, that when a man is once fairly found not guilty upon any indictment, or other proſecution, before any court having competent juriſdiction of the offence [j], he may plead ſuch acquittal in bar of any ſubſequent accuſation for the ſame crime. Therefore an acquittal on an appeal is a good bar to an indictment on the ſame offence. And ſo alſo was an acquittal on an indictment a good bar to an appeal, by the common law [k]: and therefore, in favour of appeals, a general practice was introduced, not to try any perſon on an indictment of homicide, till after the year and day, within which appeals may be brought, were paſt; by which time it often happened that the witneſſes died, or the whole was forgotten. To remedy which inconvenience, the ſtatute 3 Hen. VII. c. 1. enacts, that in-

h See Vol. III. pag. 302.

i 2 Hawk. P. C. ch. 23.

j 3 Mod. 194.

k 2 Hawk. P. C. 373.

dictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the plea, of *auterfoits acquit* on an indictment, shall be no bar to the prosecuting of any appeal.

2. SECONDLY, the plea, of *auterfoits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime[l]. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *auterfoits acquit* and *auterfoits convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in

3. THIRDLY, the plea of *auterfoits attaint*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony[m]. And this because, generally, such proceeding on a second prosecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attaint him a second time. But to this general rule however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex*. As, 1. Where the former attainder is reversed for error, for then it

[l] 2 Hawk. P. C. 377. [m] *Ibid.* 375.

is

is the ſame as if it had never been. And the ſame reaſon holds, where the attainder is reverſed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, ſuch attainder is no bar to an appeal: for the prior ſentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the ſuit of the ſubject, by ſuffering the prior ſentence to ſtop the proſecution of a ſecond, and then, when the time of appealing is elapſed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treaſon: becauſe not only the judgment and manner of death are different, but the forfeiture is more extenſive, and the land goes to different perſons. 4. Where a perſon attainted of one felony, is afterwards indicted as principal in another, to which there are alſo acceſſories, proſecuted at the ſame time; in this caſe it is held, that the plea of *auterfoits attaint* is no bar, but he ſhall be compelled to take his trial, for the ſake of public juſtice: becauſe the acceſſories to ſuch ſecond felony cannot be convicted till after the conviction of the principal [n]. And from theſe inſtances we may collect that the plea of *auterfoits attaint* is never good, but when a ſecond trial would be quite ſuperfluous [o].

4. LASTLY, a *pardon* may be pleaded in bar; as at once deſtroying the end and purpoſe of the indictment, by remitting that puniſhment, which the proſecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arreſt of judgment, *before* ſentence is paſt; which gives it by much the preference to pleading it *after* ſentence or attainder. This is, that by ſtopping the judgment it ſtops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder cannot afterwards be reſtored, otherwiſe than by act of parliament. But, as the title of pardons is applicable to other ſtages of proſecution; and they have their reſpective force and efficacy, as well after as before conviction, outlawry, or

n Poph. 107.

o Staund. P. C. 107.

attainder; I shall therefore reserve the more minute consideration of them, till I have gone through every other title except only that of execution.

BEFORE I conclude this head of special pleas in bar, it will be necessary once more to observe; that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as if, on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first: for he has made his election what plea to abide by, and it was his own folly to chuse a rotten defence) though, I say, this strictness is observed in civil actions, *quia interest reipublicae ut sit finis litium*: yet in criminal prosecutions *in favorem vitae*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty[p]. For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted; *viz.* on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains therefore that I consider,

V. THE general issue, or plea of *not guilty*[q], upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are

[p] 2 Hal. P. C. 239.

[q] See append. §. 1.

laid

laid to be done *proditorie et contra ligeantiae suae debitum*; and, in felony, that the killing was done *felonice*; these charges, of a traiterous or felonious intent, are the points and very *gist* of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner [r].

WHEN the prisoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*" the clerk of the assise, or clerk of the arraigns, on behalf of the crown replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul prit.*" which signifies first that the prisoner is guilty, (*cul. culpable*, or *culpabilis*) and then that the king is ready to prove him so; *prît*, *praesto sum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner: for when the pleader intended to demur, he expressed his demurrer in a single word, "*judgment*;" signifying that he demanded judgment whether the writ, declaration, plea, *&c.* either in form or matter, were sufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prît*;" signifying that he was ready to prove his assertions: as may be observed from the year-books and other antient repositories of law [s]. By this replication the king and the prisoner are therefore at issue: for we may remember, in our strictures upon pleadings in the preceding book [t], it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of

[r] 2 Hal. P. C. 258.

[s] North's life of lord Guildford. 98.

[t] See Vol. III. pag. 312.

fact: which is evidently the case here, in the plea of *non cul.* by the prisoner; and the replication of *cul.* by the clerk. And we may also remember, that the usual conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in these words, "and this he is *ready* to verify; *et* "*hoc paratus est verificare:*" which same thing is here expressed by the single word "*prît.*"

How our courts came to express a matter of this importance in so odd and obscure a manner, "*rem tantam tam ne*"*gligenter,*" can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment; "*cul. prît:*" which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken [u].

BUT however it may have arisen, the joining of issue, (which though now usually entered on the record [w], is no otherwise joined [x] in any part of the proceedings) seems to be clearly the meaning of this obscure expression [y]; which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, "*culprit,* how wilt thou be tried?" for immediately upon issue joined it is inquired of the prisoner, by what trial he will make his innocence appear. This form has at present reference to appeals and approvements only wherein the appellee has his choice, either to try the accusa-

[u] Of this ignorance we may see daily instances, in the abuse of two legal terms of antient French; one, the prologue to all proclamations, "*oyez,*" or hear ye, which is generally pronounced most unmeaningly "O yes:" the other, a more pardonable mistake, *viz.* when a jury are all sworn, the officer bids the crier number them, for which the word in law-french is, "*countez;*" but we now hear it pronounced in very good English, "count these."

[w] See Appendix, §. 1.

[x] 2 Hawk. P. C. 399.

[y] 2 Hal. P. C. 258.

tion

tion by battel or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country [z], if a commoner; and, if a peer, by God and his peers [a]; the indictment, if in treason, is taken *pro confesso*: and the prisoner, in cases of felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall now [b] be convicted of the felony.

WHEN the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

z A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is, "*by God* "or *the country*," that is, either by *ordeal* or by *jury*; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by *ordeal* used formerly to be called *judicium Dei*. But it should seem, that when the question gives the prisoner an option, his answer must be positive: and not in the disjunctive, which returns the option back to the prosecutor.

a Kelynge 57. State Trials, *passim*.

b Stat. 12 Geo. III. c. 20.

CHAPTER THE TWENTY-SEVENTH.

OF TRIAL AND CONVICTION.

THE several methods of trial and conviction of offenders established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon anceſtors: who, like other northern nations, were extremely addicted to divination: a character, which Tacitus obſerves of the antient Germans[a]. They therefore invented a conſiderable number of methods of purgation or trial, to preſerve innocence from the danger of falſe witneſſes, and in conſequence of a notion that God would always interpoſe miraculouſly, to vindicate the guiltleſs.

I. THE moſt antient[b] ſpecies of trial was that by *ordeal*; which was peculiarly diſtinguiſhed by the appellation of *judicium Dei*; and ſometimes *vulgaris purgatio*, to diſtinguiſh it from the canonical purgation, which was by the oath of the party. This was of two ſorts[c], either *fire*-ordeal, or *water*-ordeal; the former being confined to perſons of higher rank, the latter to the common people[d]. Both theſe might be per-

a *de mor. Germ.* 10.

b *LL. Inae. c.* 77.

c Mirr. c. 3. §. 23.

d *Tenetur ſe purgare is qui accuſatur, per Dei judicium; ſcilicet per calidum ferrum, vel per aquam, pro diverſitate conditionis hominum: per ferrum calidum ſi fuerit homo liber; per aquam, ſi fuerit rusticus.* (Glanv. *l.* 14. *c.* 1.)

formed

formed by deputy: but the principal was to anſwer for the ſucceſs of the trial; the deputy only venturing ſome corporal pain, for hire, or perhaps for friendſhip [e]. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight; or elſe by walking, barefoot, and blindfold, over nine red-hot plowſhares, laid lengthwiſe at unequal diſtances: and if the party eſcaped being hurt, he was adjudged innocent; but if it happened otherwiſe, as without colluſion it uſually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confeſſor, is mentioned to have cleared her character, when ſuſpected of familiarity with Alwyn biſhop of Wincheſter [f].

WATER-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and eſcaping unhurt thereby: or by caſting the perſon ſuſpected into a river or pond of cold water; and, if he floated therein without any action of ſwimming, it was deemed an evidence of his guilt; but, if he ſunk, he was acquitted. It is eaſy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity ſtill practiſed in many countries to diſcover witches, by caſting them into a pool of water, and drowning them to prove their innocence. And in the eaſtern empire the fire-ordeal was uſed to the ſame purpoſe by the emperor Theodore Laſcaris; who, attributing his ſickneſs to magic, cauſed all thoſe whom he ſuſpected to handle the hot iron: thus joining (as had been well remarked [g]) to the moſt dubious crime in the world, the moſt dubious proof of innocence.

AND indeed this purgation by ordeal ſeems to have been very antient, and very univerſal, in the times of ſuperſtitious barbarity. It was known to the antient Greeks: for in the

[e] This is ſtill expreſſed in that common form of ſpeech, "of going through "fire and water to ſerve another."

[f] Tho. Rudborne *Hiſt. maj. Winton.* *l.* 4. *c.* 1.

[g] Sp. L. b. 12. c. 5.

Antigone

Antigone of Sophocles[h], a person, suspected by Creon of a misdemesnor, declares himself ready "to handle hot iron, "and to walk over fire," in order to manifest his innocence; which, the scholiast tells us, was then a very usual purgation. And Grotius[i] gives us many instances of water-ordeal in Bithynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal, said to prevail among the Indians on the coast of Malabar; where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As, in Siam, besides the usual methods of fire and water-ordeal, both parties are sometimes exposed to the fury of a tyger let loose for that purpose: and, if the beast spares either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion[k].

ONE cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as king John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquae, et ignis*[l]. And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground; for which Stiernhook[m] gives the reason; "*non defuit illis operae et* "*laboris pretium; semper enim ab ejusmodi judicio aliquid lucri* "*sacerdotibus obveniebat.*" But, to give it it's due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cùm sit contra praeceptum Domini, non tentabis Dominum* "*Deum tuum*[n]." Upon this authority, though the canons

h v. 270.
i On Numb. v. 17.
k Mod. Univ. Hist. vii. 266.
l Spelm. *Gloss.* 435.
m *de jure Sueonum, l.* 1. *c.* 8.
n *Decret. part.* 2. *caus.* 2. *qu.* 5. *dist.*7. *Decretal. lib.* 3. *tit.* 50. *c.*9. & *Gloss. ibid.*

themſelves were of no validity in England, it was thought proper (as had been done in Denmark above a century before [o]) to diſuſe and aboliſh this trial entirely in our courts of juſtice, by an act of parliament in 3 Hen. III. according to ſir Edward Coke [p], or rather by an order of the king in council [q].

II. ANOTHER ſpecies of purgation, ſomewhat ſimilar to the former, but probably ſprung from a preſumptuous abuſe of revelation in the ages of dark ſuperſtition, was the *corſned* or morſel of execration: being a piece of cheeſe or bread, of about an ounce in weight, which was conſecrated with a form of exorciſm; deſiring of the Almighty that it might cauſe convulſions and paleneſs, and find no paſſage, if the man was really guilty; but might turn to health and nouriſhment, if he was innocent [r]: as the water of jealouſy among the Jews [s] was, by God's ſpecial appointment, to cauſe the belly to ſwell and the thigh to rot, if the woman was guilty of adultery. This corſned was then given to the ſuſpected perſon, who at the ſame time alſo received the holy ſacrament [t]: if indeed the corſned was not, as ſome have ſuſpected, the ſacramental bread itſelf; till the ſubſequent invention of tranſubſtantiation preſerved it from profane uſes with a more profound reſpect than formerly. Our hiſtorians aſſure us, that Godwin, earl of Kent, in the reign of king Edward the confeſſor, abjuring the death of the king's brother, at laſt appealed to his corſned, "*per buccellam deglutiendam abjuravit* [u]," which ſtuck in his throat and killed him. This cuſtom has been long ſince gradually aboliſhed, though the remembrance of it ſtill ſubſiſts in certain phraſes of abjuration retained among the common people [w].

[o] Mod. Un. Hiſt. xxxii. 105.
[p] 9 Rep 32.
[q] 1 Rym. *Fœd.* 228. Spelm. *Gloſſ.* 326. 2 Pryn. Rec. Append. 20. Seld. *Eadm. fol.* 48.
[r] Spelm. *Gl.* 439.
[s] Numb. ch. 5.
[t] *LL. Canut. c.* 6.
[u] Ingulph.
[w] As, "I will take the ſacrament "upon it; may this morſel be my laſt;" and the like.

How-

HOWEVER we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprized to find, that in the kingdom of Pegu there still subsists a trial by the corsned, very similar to that of our ancestors, only substituting raw rice instead of bread [x]. And, in the kingdom of Monomotapa, they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree, endued with an emetic quality; which, being sufficiently masticated, is then infused in water, which is given the defendant to drink. If his stomach rejects it, he is condemned: if it stays with him, he is absolved, unless the plaintiff will drink some of the same water; and, if it stays with him also, the suit is left undetermined [y].

THESE two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, ows it's introduction among us to the princes of the Norman line. And that is

III. THE trial by *battel*, duel, or single combat; which was another species of presumptuous appeals to providence, under an expectation that heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book [z]: to which I have only to add, that the trial by battel may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore if the appel-

x Mod. Univ. Hist. vii. 129.
y *Ibid.* xv. 464.
z See Vol. III. pag. 337.

lant

lant or approver be a woman, a prieſt, an infant, or of the age of ſixty, or lame, or blind, he or ſhe may counterplead and refuſe the wager of battel; and compel the appellee to put himſelf upon the country. Alſo peers of the realm, bringing an appeal, ſhall not be challenged to wage battel, on account of the dignity of their perſons; nor the citizens of London, by ſpecial charter, becauſe fighting ſeems foreign to their education and employment. So likewiſe if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuſe the tender of battel from the appellee [a]; for it is unreaſonable that an innocent man ſhould ſtake his life againſt one who is already half-convicted.

THE form and manner of waging battel upon appeals are much the ſame as upon a writ of right; only the oaths of the two combatants are vaſtly more ſtriking and ſolemn [b]. The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the ſame by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagoniſt, ſwears to this effect. "*Hoc audi, homo, quem per manum* "*teneo, &c.* "hear this, O man, whom I hold by the "hand, who calleſt thyſelf John by the name of baptiſm, "that I, who call myſelf Thomas by the name of baptiſm, "did not felonioully murder thy father, William by name, "nor am any way guilty of the ſaid felony. So help me "God, and the ſaints; and this I will defend againſt thee "by my body, as this court ſhall award." To which the appellant replies, holding the bible and his antagoniſt's hand in the ſame manner as the other: "hear this, O man, whom "I hold by the hand, who calleſt thyſelf Thomas by the "name of baptiſm, that thou art perjured; and therefore "perjured, becauſe that thou felonioully didſt murder my

[a] 2 Hawk. P. C. 427.

[b] Flet. *l.* 1. *c.* 34. 2 Hawk. P. C. 426.

"father, William by name. So help me God and the ſaints; "and this I will prove againſt thee by my body, as this "court ſhall award[c]." The battel is then to be fought with the ſame weapons, *viz.* batons, the ſame ſolemnity, and the ſame oath againſt amulets and ſorcery, that are uſed in the civil combat: and if the appellee be ſo far vanquiſhed, that he cannot or will not fight any longer, he ſhall be adjudged to be hanged immediately; and then, as well as if he be killed in battel, providence is deemed to have determined in favour of the truth, and his blood ſhall be attainted. But if he kills the appellant, or can maintain the fight from ſunriſing till the ſtars appear in the evening, he ſhall be acquitted. So alſo if the appellant becomes recreant, and pronounces the horrible word of *craven*, he ſhall loſe his *liberam legem*, and become infamous; and the appellee ſhall recover his damages, and alſo be for ever quit, not only of the appeal, but of all indictments likewiſe for the ſame offence.

IV. THE fourth method of trial uſed in criminal caſes is that by the peers of Great Britain, in the court of parliament, or the court of the lord high ſteward, when a peer is capitally *indicted*: for in caſe of an *appeal*, a peer ſhall be tried by jury[d]. Of this enough has been ſaid in a former chapter[e]; to which I ſhall only now add, that, in the method and regulations of it's proceedings, it differs little from the trial *per patriam*, or by jury: except that no ſpecial verdict can be given in the trial of a peer[f]; becauſe the lords of parliament, or the lord high ſteward (if the trial be had in his court) are judges ſufficiently competent of the law

c There is a ſtriking reſemblance between this proceſs and that of the court of *Areopagus* at Athens for murder; wherein the proſecutor and priſoner were both ſworn in the moſt ſolemn manner: the proſecutor, that he was related to the deceaſed (for none but near relations were permitted to proſecute in that court) and that the priſoner was the cauſe of his death; the priſoner, that he was innocent of the charge againſt him. (Pott. Antiq. b. 1. c. 19.)

d 9 Rep. 30. 2 Inſt. 49.

e See pag. 259.

f Hatt. 116.

turn to receive the verdict in open court [x]. And such public or open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *chuse* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and, if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the king; but not at the suit of the prisoner [y]. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal; and is treated as such by sir Thomas Smith, two hundred years ago; who accounted "such doings to be very violent, tyrannical, and contrary to "the liberty and custom of the realm of England [z]." For, as sir Matthew Hale well observes [a], it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions:—unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances [b], where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench: for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first [c].

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation [d]; except he be appealed of felony within the time limited by law. And

x 3 St. Tr. 731. 4 St. Tr. 231. 455. 485.

y 2 Hal. P. C. 310.

z Smith's commonw. l. 3. c. 1.

a 2 Hal. P. C. 313.

b 1 Lev. 9. T. Jones. 163. St. Tr. X. 416.

c 2 Hawk. P. C. 442.

d The civil law in such case only discharges him from the same accuser, but not from the same accusation. (*Ff.* 48. 2. 7. §. 2.)

upon ſuch his acquittal, or diſcharge for want of proſecution, he ſhall be immediately ſet at large, without payment of any fee to the gaoler [e]. But if the jury find him guilty [f], he is then ſaid to be *convicted* of the crime whereof he ſtands indicted. Which conviction may accrue two ways; either by his confeſſing the offence and pleading guilty; or by his being found ſo by the verdict of his country.

WHEN the offender is thus convicted, there are two collateral circumſtances that immediately ariſe. 1. On a conviction, (or even upon an acquittal where there was a reaſonable ground to proſecute, and in fact a *bona fide* proſecution) for any grand or petit larciny or other felony, the reaſonable expenſes of proſecution, and alſo, if the proſecutor be poor, a compenſation for his trouble and loſs of time, are by ſtatutes 25 Geo. II. c. 36. and 18 Geo. III. c. 19. to be allowed him out of the county ſtock, if he petitions the judge for that purpoſe; and by ſtatute 27 Geo. II. c. 3. explained by the ſame ſtatute 18 Geo. III. c. 19. all perſons, appearing upon recognizance or *ſubpoena* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loſs of time. 2. On a conviction of larciny in particular, the proſecutor ſhall have reſtitution of his goods, by virtue of the ſtatute 21 Hen. VIII. c. 11. For by the common law there was no reſtitution of goods upon an indictment, becauſe it is at the ſuit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again [g]. But, it being conſidered that the party, proſecuting the offender by indictment, deſerves to the full as much encouragement as he who proſecutes by appeal, this ſtatute was made, which enacts, that if any perſon be convicted of larciny by the evidence of the party robbed, he ſhall have full reſtitution of his money, goods, and chattels; or the value

[e] Stat. 14 Geo. III. c. 20.

[f] In the Roman republic, when the priſoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was ſomething peculiarly delicate; not that he was guilty, but that he had not been enough upon his guard; "*parum caviſſe videtur.*" (*Feſtus.* 325.)

[g] 3 Inſt. 242.

of

of them out of the offender's goods, if he has any, by a writ to be granted by the juſtices. And the conſtruction of this act having been in great meaſure conformable to the law of appeals, it has therefore in practice ſuperceded the uſe of appeals of larciny. For inſtance: as formerly upon appeals [h], ſo now upon indictments of larciny, this writ of reſtitution ſhall reach the goods ſo ſtolen, notwithſtanding the property [i] of them is endeavoured to be altered by ſale in market overt [k]. And, though this may ſeem ſomewhat hard upon the buyer, yet the rule of law is that "*ſpoliatus debet, ante omnia, reſtitui;*" eſpecially when he has uſed all the diligence in his power to convict the felon. And, ſince the caſe is reduced to this hard neceſſity, that either the owner or the buyer muſt ſuffer; the law prefers the right of the owner, who has done a meritorious act by purſuing a felon to condign puniſhment, to the right of the buyer, whoſe merit is only negative, that he has been guilty of no unfair tranſaction. And it is now uſual for the court, upon the conviction of a felon, to order (without any writ) immediate reſtitution of ſuch goods, as are brought into court, to be made to the ſeveral proſecutors. Or, elſe, ſecondly, without ſuch writ of reſtitution, the party may peaceably retake his goods, wherever he happens to find them [l], unleſs a new property be fairly acquired therein. Or, laſtly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover againſt him for his goods; and recover a ſatisfaction in damages. But ſuch action lies not before proſecution; for ſo felonies would be made up and healed [m]: and alſo recaption is unlawful, if it be done with intention to ſmother or compound the larciny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter [n].

It is not uncommon, when a perſon is convicted of a miſdemeſnor, which principally and more immediately affects ſome individual, as a battery, impriſonment, or the like, for the court to permit the defendant to *ſpeak with the proſecutor,*

h Bracton. *de coron. c.* 32.
i See Vol. II. pag. 450.
k 1 Hal. P. C. 543.
l See Vol. III. pag. 4.
m 1 Hal. P. C. 546.
n See pag. 133.

before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done, to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice: and, though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter-sessions; where prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by this means, the rules of evidence are entirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. "This," says an elegant writer [o], (who pleads with equal strength for the *certainty* as for the *lenity* of punishment,) "may be an act of good nature and humanity, but "it is contrary to the good of the public. For, although a "private citizen may dispense with satisfaction for his private "injury, he cannot remove the necessity of public example. "The right of punishing belongs not to any one individual, "in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give "up that of others."

[o] Becc. ch. 46.

CHAPTER THE TWENTY-EIGHTH.

OF THE BENEFIT OF CLERGY.

AFTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the *benefit of clergy:* a title of no small curiosity as well as use; and concerning which I shall therefore inquire, 1. Into it's original, and the various mutations which this privilege of clergy has sustained. 2. To what person it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. CLERGY, the *privilegium clericale*, or in common speech *the benefit of clergy*, had it's original from the pious regard paid by christian princes to the church in it's infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds: 1. Exemption of *places*, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

BUT the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right; and as a

right of the higheſt nature, indefeaſible, and *jure divino*[a]. By their canons therefore and conſtitutions they endeavoured at, and where they met with eaſy princes obtained, a vaſt extenſion of theſe exemptions: as well in regard to the crimes themſelves, of which the liſt became quite univerſal[b]; as in regard to the perſons exempted, among whom were at length comprehended not only every little ſubordinate officer belonging to the church or clergy, but even many that were totally laymen.

IN England however, although the uſurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his ſupremacy, yet a total exemption of the clergy from ſecular juriſdiction could never be thoroughly effected, though often endeavoured by the clergy[c]: and therefore, though the antient *privilegium clericale* was in *ſome* capital caſes, yet it was not *univerſally*, allowed. And in thoſe particular caſes, the uſe was for the biſhop or ordinary to demand his clerks to be remitted out of the king's courts, as ſoon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty[d]: till at length it was finally ſettled in the reign of Henry the ſixth, that the priſoner ſhould firſt be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arreſting judgment. This latter way is moſt uſually practiſed, as it is more to the ſatisfaction of the court to have the crime previouſly aſcertained by confeſſion or the verdict of a jury; and alſo it is more advantageous to the priſoner himſelf, who may poſſibly be acquitted, and ſo need not the benefit of his clergy at all.

ORIGINALLY the law was held, that no man ſhould be admitted to the privilege of clergy, but ſuch as had the *habi-*

[a] The pirncipal argument, upon which they founded this exemption, was that text of ſcripture; "touch not "mine anointed, and do my prophets "no harm." (Keilw. 181.)

[b] See Vol. III. pag. 62.

[c] Keilw. 180.

[d] 2 Hal. P. C. 377.

tum et tonsuram clericalem[e]. But in process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by statute 4 Hen. VII. c. 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1. and 32 Hen. VIII. c. 3. but is held[f] to have been virtually restored by statute 1 Edw. VI. c. 12. which statute also enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand) for all offences then clergyable to commoners, and also for the crimes of house-breaking, highway-robbery, horse-stealing, and robbing of churches.

e 2 Hal. P. C. 372. M. Paris. *A.D.* 1259. See Vol. I. pag. 24.

f Hob. 294. 2 Hal. P. C. 375.

AFTER this burning the laity, and before it the real clergy, were difcharged from the fentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclefiaftical canons. Whereupon the ordinary, not fatisfied with the proofs adduced in the profane fecular court, fet himfelf formally to work to make a purgation of the offender by a new canonical trial; although he had been previoufly convicted by his country, or perhaps by his own confeffion [f]. This trial was held before the bifhop in perfon, or his deputy; and by a jury of twelve clerks: and there, firft, the party himfelf was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who fwore they believed he fpoke the truth; then, witneffes were to be examined upon oath, but on behalf of the prifoner only; and, laftly, the jury were to bring in their verdict upon oath, which ufually acquitted the prifoner; otherwife, if a clerk, he was degraded, or put to penance [g]. A learned judge, in the beginning of the laft century [h], remarks with much indignation the vaft complication of perjury and fubornation of perjury, in this folemn farce of a mock trial; the witneffes, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party alfo, though convicted before on the cleareft evidence, and confcious of his own offence, yet was permitted and almoft compelled to fwear himfelf not guilty: nor was the good bifhop himfelf, under whofe countenance this fcene of wickednefs was daily tranfacted, by any means exempt from a fhare of it. And yet by this purgation the party was reftored to his credit, his liberty, his lands, and his capacity of purchafing afrefh, and was entirely made a new and an innocent man.

THIS fcandalous proftitution of oaths, and the forms of juftice, in the almoft conftant acquittal of felonious clerks by purgation, was the occafion, that, upon very heinous and

f Staundford. P. C. 138. *b*.
g 3 P. Wms. 447. Hob. 289.
h Hob. 291.

notorious

notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione facienda:* in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As therefore these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

ACCORDINGLY the statute 18 Eliz. c. 7. enacts, that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the statute 21 Jac. I. c. 6. allowed, that women convicted of simple larcinies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the *hand* being found ineffectual, was also changed by statute 10 & 11 W. III. c. 23.

 into

into burning in the moſt viſible part of the left *cheek*, neareſt the noſe: but, ſuch an indelible ſtigma being found by experience to render offenders deſperate, this proviſion was repealed about ſeven years afterwards, by ſtatute 5 Ann. c. 6. and, till that period, all women, all peers of parliament and peereſſes, and all male commoners who could read, were diſcharged in all clergyable felonies; the males abſolutely, if clerks in orders; and other commoners, both male and female, upon branding, and peers and peereſſes without branding, for the firſt offence: yet all liable (excepting peers and peereſſes) if the judge ſaw occaſion, to impriſonment not exceeding a year. And thoſe men, who could not read, if under the degree of peerage, were hanged.

AFTERWARDS indeed it was conſidered, that education and learning were no extenuations of guilt, but quite the reverſe: and that, if the puniſhment of death for ſimple felony was too ſevere for thoſe who had been liberally inſtructed, it was, *a fortiori*, too ſevere for the ignorant alſo. And thereupon by the ſame ſtatute 5 Ann. c. 6. it was enacted, that the benefit of clergy ſhould be granted to all thoſe who were entitled to aſk it, without requiring them to read by way of conditional merit. And experience having ſhewn, that ſo very univerſal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital puniſhments were too rigorous for theſe inferior offences, yet no puniſhment at all (or next to none) was as much too gentle; it was farther enacted by the ſame ſtatute, that when any perſon is convicted of any theft or larciny, and burnt in the hand for the ſame according to the antient law, he ſhall alſo, at the diſcretion of the judge, be committed to the houſe of correction or public workhouſe, to be there kept to hard labour for any time not leſs than ſix months, and not exceeding two years; with a power of inflicting a double confinement in caſe of the party's eſcape from the firſt. And it was alſo enacted by the ſtatutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any perſons ſhall be convicted of any larciny, either grand or petit, or any felo-

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nious ſtealing or taking of money or goods and chattels either from the perſon or the houſe of any other, or in any other manner, and who by the law ſhall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their diſcretion, inſtead of ſuch burning in the hand or whipping, may direct ſuch offenders to be tranſported to America (or, by ſtatute 19 Geo III. c. 74. to any other parts beyond the ſeas) for ſeven years: and if they return or are ſeen at large in this kingdom within that time, it ſhall be felony without benefit of clergy. And by the ſubſequent ſtatutes 16 Geo. II. c. 15. and 8 Geo. III. c. 15. many wiſe proviſions are made for the more ſpeedy and effectual execution of the laws relating to tranſportation, and the conviction of ſuch as tranſgreſs them. But now, by the ſtatute 19 Geo. III. c. 74. all offenders liable to tranſportation may in lieu thereof, at the diſcretion of the judges, be employed, if males (except in the caſe of petty larciny) in hard labour for the benefit of ſome public navigation; or, whether males or females, may in all caſes be confined to hard labour in certain penitentiary houſes, to be erected by virtue of the ſaid act, for the ſeveral terms therein ſpecified, but in no caſe exceeding ſeven years; with a power of ſubſequent mitigation, and even of reward, in caſe of their good behaviour. But if they eſcape and are re-taken, for the firſt time an addition of three years is made to the term of their confinement; and a ſecond eſcape is felony without benefit of clergy.

In forming the plan of theſe penitentiary houſes, the principal objects have been, by ſobriety, cleanlineſs, and medical aſſiſtance, by a regular ſeries of labour, by ſolitary confinement during the intervals of work, and by due religious inſtruction, to preſerve and amend the health of the unhappy offenders, to inure them to habits of induſtry, to guard them from pernicious company, to accuſtom them to ſerious reflection, and to teach them both the principles and practice of every chriſtian and moral duty. And if the whole of this plan be properly executed, and it's defects be timely ſupplied,

plied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes.

IT is also enacted by the same statute, 19 Geo. III. c. 74. that instead of burning in the hand (which was sometimes too slight and sometimes too disgraceful a punishment) the court in all clergyable felonies may impose a pecuniary fine; or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and in case of female offenders in the presence of females only. Which fine or whipping shall have the same consequences as burning in the hand; and the offender, so fined or whipped, shall be equally liable to a subsequent detainer or imprisonment.

IN this state does the benefit of clergy at present stand; very considerably different from it's original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

FROM the whole of this detail we may collect, that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross, as must destroy it's very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the

the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and universal, execution.

II. I AM next to inquire, to what *persons* the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other) to be admitted to this privilege, and immediately discharged; and this as often as they offend[i]. Again, all lords of parliament and peers of the realm having place and voice in parliament, by the statute 1 Edw. VI. c. 12. (which is likewise held to extend to peeresses[k]) shall be discharged in all clergyable and other felonies, provided for by the act, without any burning in the hand or imprisonment, or other punishment substituted in it's stead, in the same manner as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of some navigation; or, in case of larciny, upon being transported for seven years, if the court shall think proper. It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6. as being under a legal incapacity for orders[l]. But I must question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which

i 2 Hal. P.C. 375.

k Duchess of Kingston's case, in parliament, 22 Apr. 1776.

l 2 Hal. P. C. 373. 2 Hawk. P. C. 338. Fost. 306.

every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. THE third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larciny, nor in any mere misdemesnors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and capital felonies: which for the most part became legally entitled to this indulgence by the statute *de clero*, 25 Edw. III. st. 3. c. 4. which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country [l]; and *combustio domorum*, or arson, that is, the burning of houses [m]; all which are a kind of hostile acts, and in some degree border upon treason. And farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigor of capital punishment in the first offence, that is exerted before the *privilegium clericale* was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in statute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any case whatsoever;

l 2 Hal. P. C. 333. m 1 Hal. P. C. 346.

yet,

yet, when offences are committed within the admiralty-jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner [n]. And, to conclude this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament [o]. 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute [p]. 3. That, when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary) a principal in the second degree, being present, aiding, and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the *person committing* the offence, (as in the case of stabbing, or committing larciny in a dwelling-house, or privately from the person) his aiders and abetters are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally [q].

IV. Lastly, we are to inquire what the consequences are to the party, of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

And, we may observe, 1. That by this conviction he forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender [r]. 2. That, after conviction, and till he receives the judgment

n Moor. 756. Fost. 288.
o 2 Hal. P. C. 330.
p 2 Hawk. P. C. 341.
q 1 Hal. P. C. 529. Foster 356, 357.
r 2 Hal. P. C. 388.

of

of the law, by branding or some of it's substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon[s]. 3. That, after burning or it's substitute, or pardon, he is discharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning, or it's substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted[t]. 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in it's stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it[u].

[s] 3 P. Wms. 487.
[t] 2 Hal. P. C. 389. 5 Rep. 110.
[u] 2 Hal. P. C. 389, 390.

CHAPTER THE TWENTY-NINTH.

OF JUDGMENT AND IT'S CONSEQUENCES.

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemesnors, as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemesnor, (the trial of which may, and does usually, happen in his absence, after he has once appeared) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again [a]. And we may take notice, 1. That none of the statutes of *jeofails* [b], for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favour of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale indeed complains, "that this strictness is grown to be a "blemish and inconvenience in the law, and the administra-"tion thereof: for that more offenders escape by the over-

[a] 4 Rep. 45.

[b] See Vol. III. pag. 407.

"easy

"easy ear given to exceptions in indictments, than by their "own innocence [c]." And yet no man was more tender of life than this truly excellent judge.

A PARDON also, as has been before said, may be pleaded in arrest of judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.* the saving the attainder, and of course the corruption of blood; which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

PRAYING the benefit of clergy may also be ranked among the motions in arrest of judgment: of which we spoke largely in the preceding chapter.

IF all these resources fail, the court must pronounce that judgment, which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive *(a)*. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savours of torture or cruelty: a sledge or hurdle

[c] 2 Hal. P. C. 193.

(a) But this is now altered by statute 30 Geo. III. c. 48. which enacts that in all cases of conviction of any woman for high or petit treason, the judgment shall be that she shall be drawn and hanged, and not burned; and if any woman is convicted of petit treason, she shall be liable to such farther penalties as are directed by statute of 25 Geo. III. c. 37. to be given upon persons convicted of wilful murder.

being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any persons being embowelled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears: others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines: and lastly there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes, as either arise from indigence, or render even opulence disgraceful. Such as whipping, hard labour in the house of correction or otherwise, the pillory, the stocks, and the ducking-stool.

DISGUSTING as this catalogue may seem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity

or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

THE discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, *viz.* by fine or imprisonment, is, in these cases, fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five and twenty *denarii*: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights[d] has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second) and the same statute

[d] Stat. 1 W. & M. st. 2. c. 2.

farther

farther declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory of the old constitutional law: and accordingly we find it expressly holden, long before [e], that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

THE reasonableness of fines in criminal cases has also being usually regulated by the determination of *magna carta*, c. 14. concerning amercements for misbehaviour by the suiters in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo; et mercator eodem modo, salva mercandisa sua; et villanus eodem modo, amercietur, salvo wainagio suo.*" A rule, that obtained even in Henry the second's time [f], and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms ("*sit in misericordia*") shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute Westm. 1. c. 18; and then the judges estreated them into the exchequer [g]. But in the court leet and court baron it is still performed by *affeerors*, or suitors sworn to *affeere*, that is, tax and moderate the *general* amercement according to the *particular* circumstances of the offence and

[e] 2 Inst. 48.
[f] Glanv. *l*. 9. *c*. 8 & 11.
[g] F. N. B. 76.

the offender[h]. Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger (not being party to any suit) it was then denominated a *fine*[i]; and the antient practice was, when any such fine was imposed, to inquire by a jury "*quantum inde regi dare valeat per annum, salva sustentatione* "*sua, et uxoris, et liberorum suorum*[j]." And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine[k]: according to an antient maxim, *qui non habet in crumena luat in corpore*. Yet, where any statute speaks both of fine and ransom, it is holden, that the ransom shall be treble to the fine at least[l].

WHEN sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is *attainder*. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of it's protection, and takes no farther care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law[m]. This is after *judgment*: for there is great difference between a man *convicted*, and *attainted*; though they are frequently

h The affeeror's oath is conceived in the very terms of *magna carta*. Fitzh. Survey. ch. 11.

i 8 Rep. 40.

j Gilb. Exch. c. 5.

k Mirr. c. 5. § 3. Lamb. *Eirenarch*. 575.

l Dyer. 232.

m 3 Inst. 213.

through

through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

THE consequences of attainder are forfeiture and corruption of blood.

I. FORFEITURE is twofold; of real, and personal estates. First, as to real estates: by attainder in high treason [n] a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown: and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances [o], but not those before the fact: and therefore a wife's jointure is not forfeitable for the treason of her husband; because settled upon her previous to the treason committed. But her dower

[n] Co. Litt. 392. 3 Inst. 19. 1 Hal. P. C. 240. 2 Hawk. P. C. 448.

[o] 3 Inst. 211.

is forfeited, by the express provision of statute 5 & 6 Edw. VI, c. 11. And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason [p]: for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands: for he never was attainted of treason [q]. But if the chief justice of the king's bench (the supreme coroner of all England) in person, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited [r].

THE natural justice of forfeiture or confiscation of property, for treason [f], is founded in this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community: among which *social* advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending: according to that beautiful sentiment of Cicero [s], "*nec vero me fugit quam sit acerbum, parentum scelera filiorum* "*poenis lui: sed hoc praeclare legibus comparatum est, ut caritas* "*liberorum amiciores parentes reipublicae redderet.*" And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising

p 1 Hal. P. C. 359.
q Co. Litt. 13.
r 4 Rep. 57.
f See Vol. I. pag. 259.
s *ad Brutum, ep.* 12.

spising the power of the tyrants; his old age, and his want of children: for children are pledges to the prince of the father's obedience [t]. Yet many nations have thought, that this posthumous punishment savours of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but that of treason thought it more just, "*ibi esse poenam, ubi et noxa est;*" and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum* [v]:" and Justinian also made a law to restrain the punishment of relations [u]; which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital punishment of treason, not only to the children but to all the relations of the delinquent [w]: and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle [x], (copied almost *verbatim* from Justinian's code [y]) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honor ecclesiastical or civil: "to the end "that, being always poor and necessitous, they may for ever "be accompanied by the infamy of their father: may languish in continual indigence; and may find (says this "merciless edict) their punishment in living, and their relief in dying."

WITH us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feodal policy, (as has been already observed [z]) but was antecedent to the establishment of that system in this island; be-

t Gravin. 1. §. 68.
v *Cod.* 9. 47. 22.
u *Nov.* 134. *c.* 13.
w Qu. Curt. *l.* 6.
x *cap.* 24.
y *l.* 9. *t.* 8. *l.* 5.
z See Vol. II. pag. 251.

ing tranſmitted from our Saxon anceſtors [a], and forming a part of the antient Scandinavian conſtitution [b]. But in certain treaſons relating to the coin, (which, as we formerly obſerved, ſeem rather a ſpecies of the *crimen falſi*, than the *crimen laeſae majeſtatis*) it is provided by ſome of the modern ſtatutes [c] which conſtitute the offence, that it ſhall work no forfeiture of lands, ſave only for the life of the offender; and by all, that it ſhall not deprive the wife of her dower [d]. And, in order to aboliſh ſuch hereditary puniſhment entirely, it was enacted by ſtatute 7 Ann. c. 21. that after the deceaſe of the late pretender, no attainder for treaſon ſhould extend to the diſinheriting of any heir, nor to the prejudice of any perſon, other than the traitor himſelf. By which, the law of forfeitures for high treaſon would by this time have been at an end, had not a ſubſequent ſtatute intervened to give them a longer duration. The hiſtory of this matter is ſomewhat ſingular and worthy obſervation. At the time of the union, the crime of treaſon in Scotland was, by the Scots law, in many reſpects different from that of treaſon in England; and particularly in it's conſequence of forfeitures of entailed eſtates, which was more peculiarly Engliſh; yet it ſeemed neceſſary, that a crime ſo nearly affecting government ſhould, both in it's eſſence and conſequences, be put upon the ſame footing in both parts of the united kingdoms. In new-modelling theſe laws, the Scotch nation and the Engliſh houſe of commons ſtruggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood: which the houſe of lords as firmly reſiſted. At length a compromiſe was agreed to, which is eſtabliſhed by this ſtatute, *viz.* that the ſame crimes, and no other, ſhould be treaſon in Scotland that are ſo in England; and that the Engliſh forfeitures and corruption of blood ſhould take place in Scotland, till the death of the then pretender; and then ceaſe throughout the whole of Great Britain [e]: the lords artfully propoſing this temporary clauſe, in

[a] *LL. Aelfr. c.* 4. *Canut. c.* 54.

[b] Stiernh. *de jure Goth. l.* 2. *c.* 6. *&* *l.* 3. *c.* 3.

[c] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.

[d] *Ibid.* 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

[e] Burnet's Hiſt. *A. D.* 1709.

hopes (it is ſaid[f]) that the prudence of ſucceeding parliaments would make it perpetual[g]. This has partly been done by the ſtatute 17 Geo. II. c. 39. (made in the year preceding the late rebellion) the operation of theſe indemnifying clauſes being thereby ſtill farther ſuſpended, till the death of the ſons of the pretender[h].

IN petit treaſon and felony, the offender alſo forfeits all his chattel intereſts abſolutely, and the profits of all eſtates of freehold during life; and, after his death, all his lands and tenements in fee ſimple (but not thoſe in tail) to the crown, for a very ſhort period of time: for the king ſhall have them for a year and a day, and may commit therein what waſte he pleaſes; which is called the king's *year*, *day*, and *waſte*[i]. Formerly the king had only a liberty of committing waſte on the lands of felons, by pulling down their houſes, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a puniſhment of a ſimilar ſpirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel[k] and Ezra[l]; which, beſides the pain of death inflicted on the delinquents there ſpecified, ordain, "that their houſes ſhall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed, in the reign of Henry the firſt, in this kingdom, that the king ſhould have the profits of the land for one year and a day, in lieu of the deſtruction he was otherwiſe at liberty to commit[m]: and therefore *magna carta*[n] provides, that the king ſhall only hold ſuch lands for a year and a day, and then reſtore them to the lord of the fee; without any mention made of waſte. But the ſtatute 17 Edw. II. *de praerogativa regis* ſeems to ſuppoſe, that the king ſhall have his

f Conſiderations on the law of forfeiture. 6.

g See Foſt. 250.

h The juſtice and expediencey of this proviſion were defended at the time, with much learning and ſtrength of argument, in the *conſiderations on the law of forfeiture*, firſt publiſhed *A. D.* 1744. (See Vol. I. pag. 244.)

i 2 Inſt. 37.

k ch. iii. v. 29.

l ch. vi. v. 11.

m Mirr. c. 4. §. 16. *Flet. l.* 1. *c.* 28.

n 9 *Hen. III. c.* 22.

year,

year, day, *and* waste: and not the year and day *instead of* waste. Which sir Edward Coke (and the author of the mirror before him) very justly look upon as an encroachment, though a very antient one, of the royal prerogative [o]. This year, day, and waste are now usually compounded for; but otherwise they regularly belong to the crown; and, after their expiration, the land would naturally have descended to the heir, (as in gavelkind tenure it still does) did not it's feodal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon [p]. They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities.

THESE are all the forfeitures of real estates, created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of *praemunire* and others: because I look upon them rather as a *part* of the judgment and penalty, inflicted by the respective statutes, than as *consequences* of such judgment; as in treason and felony they are, But I shall just mention, as a part of the forfeiture of real estates, the forfeiture of the profits of lands during life: which extends to two other instances, besides those already spoken of, misprision of treason [q], and striking in Westminster-hall, or drawing a weapon upon a judge there, sitting in the king's courts of justice [r].

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treason or misprision

[o] Mirr. c. 5. §. 2. 2 Inst. 37.
[p] 3 Inst. 55.
[q] *Ibid.* 218.
[r] *Ibid.* 141.

thereof,

thereof, petit treaſon, felonies of all ſorts whether clergyable or not, ſelf-murder or felony *de ſe*, petit larciny, ſtanding mute, and the above-mentioned offences of ſtriking, &c. in Weſtminſter-hall. For *flight* alſo, on an accuſation of treaſon, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury find the flight, the party ſhall forfeit his goods and chattels: for the very flight is an offence, carrying with it a ſtrong preſumption of guilt, and is at leaſt an endeavour to elude and ſtifle the courſe of juſtice preſcribed by the law. But the jury very ſeldom find the flight[f]: forfeiture being looked upon, ſince the vaſt increaſe of perſonal property of late years, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty.

THERE is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Becauſe in many of the caſes where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in thoſe caſes the forfeiture muſt be upon conviction, or not at all; and, being neceſſarily upon conviction in thoſe, it is ſo ordered in all other caſes, for the law loves uniformity. 2. In outlawries for treaſon or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being firſt put in the *exigent*, without ſtaying till he is *quinto exactus*, or finally outlawed; for the ſecreting himſelf ſo long from juſtice, is conſtrued a flight in law[s]. 3. The forfeiture of lands has relation to the time of the fact committed, ſo as to avoid all ſubſequent ſales and incumbrances: but the forfeiture of goods and chattels has no relation backwards; ſo that thoſe only which a man has at the time of conviction ſhall be forfeited. Therefore a traitor or felon may *bona fide* ſell any of his chattels, real or perſonal, for the ſuſtenance of himſelf and family between the fact and conviction[t]: for perſonal property is of

[f] Staundf. P. C. 183. b.
[s] 3 Inſt. 232.
[t] 2 Hawk. P. C. 454.

ſo

ſo fluctuating a nature, that it paſſes through manyhands in a ſhort time; and no buyer could be ſafe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treaſon or felony. Yet if they be colluſively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the ſtatute 13 Eliz. c. 5.) will reach them; for they are all the while truly and ſubſtantially the goods of the offender: and as he, if acquitted, might recover them himſelf, as not parted with for a good conſideration; ſo in caſe he happens to be convicted, the law will recover them for the king.

II. ANOTHER immediate conſequence of attainder is the *corruption of blood*, both upwards and downwards; ſo that an attainted perſon can neither inherit lands or other hereditaments from his anceſtors, nor retain thoſe he is already in poſſeſſion of, nor tranſmit them by deſcent to any heir; but the ſame ſhall eſcheat to the lord of the fee, ſubject to the king's ſuperior right of forfeiture: and the perſon attainted ſhall alſo obſtruct all deſcents to his poſterity, wherever they are obliged to derive a title through him to a remoter anceſtor[u].

THIS is one of thoſe notions which our laws have adopted from the feodal conſtitutions, at the time of the Norman conqueſt; as appears from it's being unknown in thoſe tenures which are indiſputably Saxon, or gavelkind: wherein, though by treaſon, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of deſcents, enſues; and, on judgment of mere felony, no eſcheat accrues to the lord. And therefore, as every other oppreſſive mark of feodal tenure is now happily worn away in theſe kingdoms, it is to be hoped, that this *corruption of blood*, with all it's connected conſequences, not only of preſent eſcheat, but of future incapacities of inheritance even to the twentieth generation, may in proceſs of time be aboliſhed by act of parliament: as it ſtands upon a very different footing from the forfeiture of lands for high

[u] See Vol. II. pag. 251.

treaſon,

treaſon, affecting the king's perſon or government. And indeed the legiſlature has, from time to time, appeared very inclinable to give way to ſo equitable a proviſion; by enacting, that, in certain treaſons reſpecting the papal ſupremacy [w] and the public coin [x], and in many of the new-made felonies, created ſince the reign of Henry the eighth by act of parliament, corruption of blood ſhall be ſaved. But as in ſome of the acts for creating felonies (and thoſe not of the moſt atrocious kind) this ſaving was neglected, or forgotten, to be made, it ſeems to be highly reaſonable and expedient to antiquate the whole of this doctrine by one undiſtinguiſhing law: eſpecially as by the afore-mentioned ſtatute of 7 Ann. c. 21. (the operation of which is poſtponed by ſtatute 17 Geo. II. c. 39.) after the death of the ſons of the late pretender, no attainder for treaſon will extend to the diſinheriting any heir, nor the prejudice of any perſon, other than the offender himſelf; which virtually aboliſhes all corruption of blood for treaſon, though (unleſs the legiſlature ſhould interpoſe) it will ſtill continue for many ſorts of felony.

w Stat. 5 Eliz. c. 1.

x Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

CHAPTER THE THIRTIETH.

OF REVERSAL OF JUDGMENT.

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A JUDGMENT may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of

of either A, or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error [a]; it being a high misdemesnor in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed and suffer death. So likewise if a man purchases land of another; and afterwards the vendor is, either by outlawry, or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat: now, upon any trial, the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself; and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowleged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before [b].

SECONDLY, a judgment may be reversed, *by writ of error*: which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county court was held; for laying an offence, committed in the time of the late king, to be done against the peace of the present; and for many other similar

[a] 2 Hawk. P. C. 459.

[b] 3 Inst. 231. 1 Hal. P. C. 361.

causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error, to reverse judgments in case of misdemesnors, are not to be allowed of course, but on sufficient probable cause shewn to the attorney-general; and then they are understood to be grantable of common right, and *ex debito justitiae*. But writs of error to reverse attainders in capital cases are only allowed *ex gratia*; and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general [c]. These therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the state: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be some consolation to his family. But the easier, and more effectual way, is,

LASTLY, to reverse the attainder by act of parliament. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowleged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some, or one of them, by act of parliament; which (so far as it extends) has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence (*t*).

THE effect of falsifying, or reversing, an outlawry is that the party shall be in the same plight as if he had appeared upon the *capias*: and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his non-ap-

c 1 Vern. 170. 175.

(*t*) [This has been lately done with respect to the forfeited estates in Scotland, by statute 24 Geo. III. c. 57.]

pearance,

pearance, remain good and effectual as before. But when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseisor[d]. But he still remains liable to another prosecution for the same offence: for, the first being erroneous, he never was in jeopardy thereby.

[d] 2 Hawk. P. C. 462.

CHAPTER THE THIRTY-FIRST.

OF REPRIEVE AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A REPRIEVE, from *reprendre*, to take back, is the withdrawing of a ſentence for an interval of time; whereby the execution is ſuſpended. This may be, firſt, *ex arbitrio judicis;* either before or after judgment: as, where the judge is not ſatisfied with the verdict, or the evidence is ſuſpicious, or the indictment is inſufficient, or he is doubtful whether the offence be within clergy; or ſometimes if it be a ſmall felony, or any favourable circumſtances appear in the criminal's character, in order to give room to apply to the crown for either an abſolute or conditional pardon. Theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol delivery, although their ſeſſion be finiſhed, and their commiſſion expired: but this rather by common uſage, than of ſtrict right[a].

REPRIEVES may alſo be *ex neceſſitate legis:* as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cauſe to ſtay the judgment, yet it is to reſpite the execution till ſhe be delivered. This is a mercy

[a] 2 Hal. P. C. 412.

dictated by the law of nature, *in favorem prolis*; and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty, that was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic [b]. A barbarity which they never learned from the laws of *antient* Rome; which direct [c], with the same humanity as our own, "*quod praegnantis mulieris damnatae* "*poena differatur, quoad pariat*:" which doctrine has also prevailed in England, as early as the first memorials of our law will reach [d]. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child*, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause [e]. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

ANOTHER cause of regular reprieve is, if the offender become *non compos*, between the judgment and the award of execution [f]: for regularly, as was formerly [g] observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he

[b] Fox, Acts and Mon.
[c] *Ff*. 48. 19. 3.
[d] Flet. *l*. 1. *c*. 38.
[e] 1 Hal. P. C. 369.
[f] *Ibid*. 370.
[g] See pag. 24.

ſhall not be ordered for execution: for "*furioſus ſolo furore* "*punitur*," and the law knows not but he might have offered ſome reaſon, if in his ſenſes, to have ſtayed theſe reſpective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the priſoner what he hath to allege, why execution ſhould not be awarded againſt him: and, if he appears to be inſane, the judge in his diſcretion may and ought to reprieve him. Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diverſity of perſon, *viz.* that he is not the ſame that was attainted, and the like. In this laſt caſe a jury ſhall be impanelled to try this collateral iſſue, namely, the identity of his perſon; and not whether guilty or innocent; for that has been decided before. And in theſe collateral iſſues the trial ſhall be *inſtanter*[h], and no time allowed the priſoner to make his defence or produce his witneſſes, unleſs he will make oath that he is not the perſon attainted[i]: neither ſhall any peremptory challenges of the jury be allowed the priſoner[j]; though formerly ſuch challenges were held to be allowable, whenever a man's life was in queſtion[k].

II. If neither pregnancy, inſanity, non-identity, nor other plea will avail to avoid the judgment, and ſtay the execution conſequent thereupon, the laſt and ſureſt reſort is in the king's moſt gracious *pardon*; the granting of which is the moſt amiable prerogative of the crown. Law (ſays an able writer) cannot be framed on principles of compaſſion to guilt: yet juſtice, by the conſtitution of England, is bound to be adminiſtered in mercy: this is promiſed by the king in his coronation oath, and it is that act of his government, which is the moſt perſonal, and moſt entirely his own[l]. The king himſelf condemns no man; that rugged taſk he leaves to his courts of juſtice: the great operation of his ſceptre is

[h] 1 Sid. 72. See Appendix. §. 3.
[i] Foſt. 42.
[j] 1 Lev. 61. Foſt. 42. 46.
[k] Staundf. P.C. 163. Co. Lit. 157. Hal. Sum. 259.
[l] Law of forfeit. 99.

mercy. His power of pardoning was said by our Saxon ancestors [m] to be derived *a lege suae dignitatis*: and it is declared in parliament, by statute 27 Hen. VIII. c. 24. that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm [n].

THIS is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists [o]) should be excluded in a perfect legislation, where punishments are mild but certain; for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter [p]; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowleged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This (as the president Montesquieu observes [q]) would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour. In

[m] *LL. Edw. Conf. c.* 18.

[n] And this power belongs only to a king *de facto*, and not to a king *de jure* during the time of usurpation. (Bro. Abr. *t. charter de pardon*, 22.)

[o] Beccar. ch. 46.

[p] *Ibid.* ch. 4.

[q] Sp. L. b. 6. c. 5.

Holland therefore, if there be no ſtadtholder, there is no power of pardoning lodged in any other member of the ſtate. But in monarchies the king acts in a ſuperior ſphere; and though he regulates the whole government as the firſt mover, yet he does not appear in any of the diſagreeable or invidious parts of it. Whenever the nation ſee him perſonally engaged, it is only in works of legiſlature, magnificence, or compaſſion. To him therefore the people look up as the fountain of nothing but bounty and grace; and theſe repeated acts of goodneſs, coming immediately from his own hand, endear the ſovereign to his ſubjects, and contribute more than any thing to root in their hearts that filial affection, and perſonal loyalty, which are the ſure eſtabliſhment of a prince.

UNDER this head, of pardons, let us briefly conſider, 1. The *object* of pardon: 2. The *manner* of pardoning: 3. The method of *allowing* a pardon: 4. The *effect* of ſuch pardon, when allowed.

1. AND, firſt, the king may pardon all offences merely againſt the crown, or the public; excepting, 1. That, to preſerve the liberty of the ſubject, the committing any man to priſon out of the realm, is by the *habeas corpus* act, 31 Car. II. c. 2. made a *praemunire*, unpardonable even by the king. Nor, 2. can the king pardon, where private juſtice is principally concerned in the proſecution of offenders: "*non poteſt rex gratiam facere cum injuria et damno aliorum* [r]." Therefore in appeals of all kinds (which are the ſuit, not of the king, but of the party injured) the proſecutor may releaſe, but the king cannot pardon [s]. Neither can he pardon a common nuſance, while it remains unredreſſed, or ſo as to prevent an abatement of it; though afterwards he may remit the fine: becauſe though the proſecution is veſted in the king to avoid multiplicity of ſuits, yet (during it's continuance) this offence ſavours more of the nature of a *private*

[r] 3 Inſt. 236.

[s] *Ibid.* 237.

injury to each individual in the neighbourhood, than of a *public* wrong [t]. Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought: for thereby the informer hath acquired a private property in his part of the penalty [v].

THERE is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.* that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the earl of Danby was impeached by the house of commons of high treason, and other misdemesnors, and pleaded the king's pardon in bar of the same, the commons alleged [u], "that there "was no precedent, that ever any pardon was granted to any "person impeached by the commons of high treason, or other "high crimes, *depending the impeachment*;" and thereupon resolved [w], "that the pardon so pleaded was illegal and void, "and ought not to be allowed *in bar* of the impeachment of "the commons of England:" for which resolution they assigned [x] this reason to the house of lords, "that the setting "up a pardon to be a *bar* of an impeachment defeats the "whole use and effect of impeachments: for should this "point be admitted, or stand doubted, it would totally dis-"courage the exhibiting any for the future; whereby the "chief institution for the preservation of the government "would be destroyed." Soon after the revolution, the commons renewed the same claim, and voted [y], "that a "pardon is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the act of settlement, 12 & 13 W. III. c. 2. "that no pardon under the great seal of Eng-"land shall be *pleadable* to an impeachment by the commons "in parliament." But, after the impeachment has been solemnly heard and determined, it is not understood that the

[t] 2 Hawk. P. C. 391.
[v] 3 Inst. 338.
[u] Com. Journ. 28 Apr. 1679.
[w] *Ibid.* 5 May 1679.
[x] *Ibid.* 26 May 1679.
[y] *Ibid.* 6 June 1689.

king's royal grace is farther restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

2. As to the *manner* of pardoning. 1. First, it must be under the *great* seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon [z]. 2. Next, it is a general rule, that, wherever it may reasonably be presumed the king is deceived, the pardon is void [a]. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed [b]. 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is presumed the king knew not of those proceedings) but the conviction or attainder must be particularly mentioned [c]; and a pardon of felonies will not include piracy [d]; for that is no felony punishable at the common law. 4. It is also enacted by statute 13 Ric. II. st. 2. c. 1. that no pardon for treason, murder, or rape shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which sir Edward Coke observes [e], that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that

[z] 5 St. Tr. 166. 173.
[a] 2 Hawk. P. C. 383.
[b] 3 Inst. 238.
[c] 2 Hawk. P. C. 383.
[d] 1 Hawk. P. C. 99.
[e] 3 Inst. 236.

which

which happens *se defendendo* or *per infortunium*: to which two ſpecies the king's pardon was expreſsly confined by the ſtatutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide ſhall be granted, but only where the king may do it *by the oath of his crown*; that is to ſay, where a man ſlayeth another in his own defence, or by misfortune. But the ſtatute of Richard the ſecond, before-mentioned, enlarges by implication the royal power: provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obſtante* of the ſtatute of king Richard, till the time of the revolution; when the doctrine of *non obſtante's* ceaſing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench [f], that the king may pardon on an indictment of murder, as well as a ſubject may diſcharge an appeal. Under theſe and a few other reſtrictions, it is a general rule, that a pardon ſhall be taken moſt beneficially *for* the ſubject, and moſt ſtrongly againſt the king.

A PARDON may alſo be *conditional*: that is, the king may extend his mercy upon what terms he pleaſes; and may annex to his bounty a condition either precedent or ſubſequent, on the performance whereof the validity of the pardon will depend: and this by the common law [g]. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a ſtated time, or of tranſportation to ſome foreign country for life, or for a term of years; ſuch tranſportation or baniſhment [h] being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2. ſ. 14. and both the impriſonment and tranſportation rendered more eaſy and effectual by ſtatutes 8 Geo. III. c. 15. and 19 Geo. III. c. 74.

3. WITH regard to the manner of *allowing* pardons; we may obſerve, that a pardon by act of parliament is more be-

f Salk. 499.

g 2 Hawk. P. C. 394.

h Tranſportation is ſaid (Bar. 352.) to have been firſt inflicted as a puniſhment, by ſtatute 39 Eliz. c. 4.

neficial

neficial than by the king's charter; for a man is not bound to plead it, but the court muſt *ex officio* take notice of it[i]; neither can he loſe the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon[k]. The king's charter of pardon muſt be ſpecially pleaded; and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himſelf upon his trial by pleading the general iſſue, he has waived the benefit of ſuch pardon[l]. But, if a man avails himſelf thereof as ſoon as by courſe of law he may, a pardon may either be pleaded upon arraignment, or in arreſt of judgment, or in the preſent ſtage of proceedings, in bar of execution. Antiently, by ſtatute 10 Edw. III. c. 2. no pardon of felony could be allowed, unleſs the party found ſureties for the good behaviour before the ſheriff and coroners of the county[m]. But that ſtatute is repealed by the ſtatute 5 & 6 W. & M. c. 13. which, inſtead thereof, gives the judges of the court a diſcretionary power to bind the criminal, pleading ſuch pardon, to his good behaviour, with two ſureties, for any term not exceeding ſeven years.

4. LASTLY, the *effect* of ſuch pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not ſo much to reſtore his former, as to give him a new, credit and capacity. But nothing can reſtore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and tranſcendent power of parliament. Yet if a perſon attainted receives the king's pardon, and afterwards hath a ſon, that ſon may be heir to his father, becauſe the father being made a new man, might tranſmit new inheritable blood: though, had he been born before the pardon, he could never have inherited at all[n].

[i] Foſt. 43.
[k] 2 Hawk. P. C. 397.
[l] *Ibid.* 396.
[m] Salk 499.
[n] See Vol. II. pag. 254.

CHAPTER THE THIRTY-SECOND.

OF EXECUTION.

THERE now remains nothing to ſpeak of, but *execution:* the completion of human puniſhment. And this, in all caſes, as well capital as otherwiſe, muſt be performed by the legal officer, the ſheriff or his deputy; whoſe warrant for ſo doing was antiently by precept under the hand and ſeal of the judge, as it is ſtill practiſed in the court of the lord high ſteward, upon the execution of a peer [a]: though, in the court of the peers in parliament, it is done by writ from the king [b]. Afterwards it was eſtabliſhed [c], that, in caſe of life, the judge may command execution to be done without any writ. And now the uſage is, for the judge to ſign the calendar, or liſt of all the priſoners' names, with their ſeparate judgments in the margin, which is left with the ſheriff. As, for a capital felony, it is written oppoſite to the priſoner's name "let him be hanged by the neck;" formerly, in the days of Latin and abbreviation [d], "*ſuſ. per coll.*" for "*ſuſpendatur per collum.*" And this is the only warrant that the ſheriff has, for ſo material an act as taking away the life of another [e]. It may certainly afford matter of ſpeculation, that in civil cauſes there ſhould be ſuch a variety of writs of execution to recover a trifling debt, iſſued in the king's name, and under the ſeal of the court, without which the ſheriff

a 2 Hal. P. C. 409.
b See append. §. 5.
c Finch. L. 478.
d Staundf. P. C. 182.
e 5 Mod. 22.

cannot

cannot legally ſtir one ſtep; and yet that the execution of a man, the moſt important and terrible taſk of any, ſhould depend upon a marginal note.

THE ſheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is alſo left at large. In London indeed a more ſolemn and becoming exactneſs is uſed, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in perſon the caſe of the ſeveral priſoners, and receiving his royal pleaſure, that the law muſt take it's courſe, iſſues his warrant to the ſheriffs; directing them to do execution on the day and at the place aſſigned [f]. And, in the court of king's bench, if the priſoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either ſpecifying the time and place [g], or leaving it to the diſcretion of the ſheriff [h]. And, throughout the kingdom, by ſtatute 25 Geo. II. c. 37. it is enacted that, in caſe of murder, the judge ſhall in his ſentence direct execution to be performed on the next day but one after ſentence paſſed [i]. But, otherwiſe, the time and place of execution are by law no part of the judgment [k]. It has been well obſerved [l], that it is of great importance, that the puniſhment ſhould follow the crime as early as poſſible; that the proſpect of gratification or advantage, which tempts a man to commit the crime, ſhould inſtantly awake the attendant idea of puniſhment. Delay of execution ſerves only to ſeparate theſe ideas: and then the execution itſelf affects the minds of the ſpectators rather as a terrible ſight, than as the neceſſary conſequence of tranſgreſſion.

THE ſheriff cannot alter the manner of the execution by ſubſtituting one death for another, without being guilty of felony himſelf, as has been formerly ſaid [m]. It is held alſo

f See append. §. 4.

g St. Trials. VI. 332. Foſt. 43.

h See append. §. 3.

i See pag. 202.

k So held by the twelve judges, Mich. 10 Geo. III.

l Beccar. ch. 19.

m See pag. 179.

by

by sir Edward Coke [n] and sir Matthew Hale [o], that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, sir Edward Coke stoutly maintains, that "*judicandum est legi-* "*bus, non exemplis.*" But others have thought [p], and more justly, that this prerogative, being founded in mercy and immemorially exercised by the crown, is part of the common law. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons, (*viz.* by remitting a severe kind of death, on condition that the criminal submits to a milder) is a matter that may bear consideration. It is observable, that when lord Stafford was executed for the popish plot in the reign of king Charles the second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords, for a command or order from their lordships, how the said judgment should be executed: for, he being prosecuted by impeachment, they entertained a notion (which is said to have been countenanced by lord Russel) that the king could not pardon any part of the sentence [q]. The lords resolved [r], that the scruples of the sheriffs were unnecessary, and declared, that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified [s] to the house of commons by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it; and then [t] sullenly resolved, that the house was *content* that the sheriff do execute lord Stafford by severing his head from his body. It is further related, that when afterwards the same lord Russel was condemned for high treason upon indictment, the king while he remitted the ignominious part of

n 3 Inst. 52.

o 2 Hal. P. C. 412.

p Fost. 270. F. N. B. 244. h. 19 Rym. *Fœd.* 284.

q 2 Hum. Hist. of G. B. 3 S.

r Lords Journ. 21 Dec. 1680.

s Com. Journ. 21 Dec. 1680.

t *Ibid.* 23 Dec. 1680.

the

the ſentence, obſerved, "that his lordſhip would now find "he was poſſeſſed of that prerogative, which in the caſe of "lord Stafford he had denied him [u]." One can hardly determine (at this diſtance from thoſe turbulent times) which moſt to diſapprove of, the indecent and ſanguinary zeal of the ſubject, or the cool and cruel ſarcaſm of the ſovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the ſheriff muſt hang him again [w]. For the former hanging was no execution of the ſentence; and, if a falſe tenderneſs were to be indulged in ſuch caſes, a multitude of colluſions might enſue. Nay, even while abjurations were in force [x], ſuch a criminal, ſo reviving, was not allowed to take ſanctuary and abjure the realm; but his fleeing to ſanctuary was held an eſcape in the officer [y].

AND having thus arrived at the *laſt* ſtage of criminal proceedings, or execution, the end and completion of human *puniſhment*, which was the ſixth and laſt head to be conſidered under the diviſion of *public wrongs*, the fourth and laſt object of the laws of England; it may now ſeem high time to put a period to theſe commentaries, which the author is very ſenſible, have already ſwelled to too great a length. But he cannot diſmiſs the ſtudent, for whoſe uſe alone theſe rudiments were originally compiled, without endeavouring to recall to his memory ſome principal outlines of the legal conſtitution of this country; by a ſhort hiſtorical review of the moſt conſiderable revolutions, that have happened in the laws of England, from the earlieſt to the preſent times. And this taſk he will attempt to diſcharge, however imperfectly, in the next or concluding chapter.

u 2 Hume. 360.

w 2 Hal. P. C. 412. 2 Hawk. P. C. 463.

x See pag. 326.

y Fitzh. *Abr. t. corone.* 335. Finch. L. 467.

CHAPTER THE THIRTY-THIRD.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.

BEFORE we enter on the ſubject of this chapter, in which I propoſe, by way of ſupplement to the whole, to attempt an hiſtorical review of the moſt remarkable changes and alterations, that have happened in the laws of England, I muſt firſt of all remind the ſtudent, that the riſe and progreſs of many principal points and doctrines have been already pointed out in the courſe of theſe commentaries, under their reſpective diviſions: theſe having therefore been particularly diſcuſſed already, it cannot be expected that I ſhould re-examine them with any degree of minuteneſs; which would be a moſt tedious undertaking. What I therefore at preſent propoſe, is only to mark out ſome outlines of an Engliſh juridical hiſtory, by taking a chronological view of the ſtate of our laws, and their ſucceſſive mutations at different periods of time.

THE ſeveral periods, under which I ſhall conſider the ſtate of our legal polity, are the following ſix: 1. From the earlieſt times to the Norman conqueſt: 2. From the Norman conqueſt to the reign of king Edward the firſt: 3. From thence to the reformation: 4. From the reformation to the reſtoration of king Charles the ſecond: 5. From thence to

the revolution in 1688: 6. From the revolution to the present time.

I. AND, first, with regard to the antient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Caesar's account of the tenets and discipline of the antient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey) to be instructed; we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly, the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII, is undoubtedly of British original. So likewise is the antient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, where the same custom has continued from Caesar's time to the present; that of burning a woman guilty of the crime of petit treason by killing her husband (*a*).

THE great variety of nations, that successively broke in upon and destroyed both the British inhabitants and constitution

(*a*) But this is now altered by statute 30 Geo. III. c. 48. See ante, p. 204.

tion, the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages [a], in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out, with any degree of accuracy, *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce, that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons, discontinued by the Danes, but afterwards restored by the Normans.

WHEREVER this can be done, it is matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above-mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice [b]: so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies it's shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and it's government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of it's laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses [c]. Thirdly,

[a] Hal. Hist. C. L. 62.

[b] *Ibid.* 57.

[c] *Ibid.* 59.

this uncertainty of the true origin of particular cuſtoms muſt alſo in part have ariſen from the means, whereby chriſtianity was propagated among our Saxon anceſtors in this iſland; by learned foreigners brought over from Rome and other countries; who undoubtedly carried with them many of their own national cuſtoms; and probably prevailed upon the ſtate to abrogate ſuch uſages as were inconſiſtent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cauſe, that we find not only ſome rules of the moſaical, but alſo of the imperial and pontifical laws, blended and adopted into our own ſyſtem.

A FARTHER reaſon may alſo be given for the great variety, and of courſe the uncertain original, of our antient eſtabliſhed cuſtoms; even after the Saxon government was firmly eſtabliſhed in this iſland: *viz.* the ſubdiviſion of the kingdom into an heptarchy, conſiſting of ſeven independent kingdoms, peopled and governed by different clans and colonies. This muſt neceſſarily create an infinite diverſity of laws: even though all thoſe colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally ſprung from the ſame mother-country, the great northern hive; which poured forth it's warlike progeny, and ſwarmed all over Europe, in the ſixth and ſeventh centuries. This multiplicity of laws will neceſſarily be the caſe in ſome degree, where any kingdom is cantoned out into provincial eſtabliſhments; and not under one common diſpenſation of laws, though under the ſame ſovereign power. Much more will it happen, where ſeven unconnected ſtates are to form their own conſtitution and ſuperſtructure of government, though they all begin to build upon the ſame or ſimilar foundations.

WHEN therefore the Weſt-Saxons had ſwallowed up all the reſt, and king Alfred ſucceeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a moſt great and neceſſary work, which he is ſaid to have executed in as maſ-

terly a manner. No less than to new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of it's old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that masterpiece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his dom bec, or *liber judicialis*. This he compiled for the use of the court-baron, hundred, and county-court, the court-leet, and sheriff's tourn; tribunals, which he established, for the trial of all causes civil and criminal, in the very districts wherein the complaint arose: all of them subject however to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his houshold in those royal progresses, which he continually made from one end of the kingdom to the other.

THE Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric: but a plan, so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their antient law; retaining however some few of the customs of their late visitants; which went

under the name of *Dane-Lage*: as the code compiled by Alfred was called the *West-Saxon-Lage*; and the local constitutions of the antient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably abounded with many British customs, were called the *Mercen-Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of it's first institution; though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

FOR king Edgar, (who besides his military merit, as founder of the English navy, was also a most excellent civil governor) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun what his grandson king Edward the confessor afterwards completed; *viz.* one uniform digest or body of laws to be observed throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture (for certainty is not to be expected) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the *common* law, as extending it's authority universally over all the realm; and which is doubtless of Saxon parentage.

AMONG the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation: the *wittena-gemote*, or *commune consilium* of the antient Germans; which was not yet reduced to the forms and distinc-

tions of our modern parliament: without whose concurrence, however, no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of their peace, their coroners, their port-reeves, (since changed into mayors and bailiffs) and even their tythingmen and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued: only that perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence: even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feodal constitution; but yet were exempt from all it's rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feodal law; before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman

conqueſt: though really inconvenient, and more eſpecially deſtructive to antient families; which are in monarchies neneſſary to be ſupported, in order to form and keep up a nobility, or intermediate ſtate between the prince and the common people. 8. The courts of juſtice conſiſted principally of the county courts, and in caſes of weight or nicety the king's court held before himſelf in perſon, at the time of his parliaments; which were uſually holden in different places, according as he kept the three great feſtivals of chriſtmas, eaſter, and whitſuntide. An inſtitution which was adopted by king Alonſo VII. of Caſtile, about a century after the conqueſt: who at the ſame three great feaſts was wont to aſſemble his nobility and prelates in his court; who there heard and decided all controverſies, and then, having received his inſtructions, departed home[d]. Theſe county courts however differed from the modern ones, in that the eccleſiaſtical and civil juriſdiction were blended together, the biſhop and the ealdorman or ſheriff ſitting in the ſame county court; and alſo that the deciſions and proceedings therein were much more ſimple and unembarraſſed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very ſtrong tincture of ſuperſtition, were permitted to be by *ordeal*, by the *corſned* or morſel of execration, or by *wager of law* with compurgators, if the party choſe it; but frequently they were alſo by *jury*: for, whether or no their juries conſiſted preciſely of twelve men, or were bound to a ſtrict unanimity; yet the general conſtitution of this admirable criterion of truth, and moſt important guardian both of public and private liberty, we owe to our Saxon anceſtors. Thus ſtood the general frame of our polity at the time of the Norman invaſion; when the ſecond period of our legal hiſtory commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings: and though the alteration of the former was effected rather by the

[d] Mod. Un. Hiſt. xx. 114.

consent

consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. AMONG the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. ANOTHER violent alteration of the English constitution consisted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them, and all the antient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express licence from the king, by a grant of a chase or free-warren: and those franchises were granted as much with a view to preserve the breed of animals, as to indulge the subject. From a similar principle to which, though the forest laws are now mitigated, and by degrees

grown entirely obsolete, yet from this root has sprung a bastard slip, known by the name of the game law, now arrived to and wantoning in it's highest vigour: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor. And in one respect the antient law was much less unreasonable than the modern: for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but now, though a freeholder of less than 100 *l.* a year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free-warren) can do it without committing a trespass, and subjecting himself to an action.

3. A THIRD alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all it's multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language. A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery, as ever was imposed upon a conquered people. This lasted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of

king

king Edward came too late to eradicate. Inſtead of the plain and eaſy method of determining ſuits in the county courts, the chicanes and ſubtleties of Norman juriſprudence had taken poſſeſſion of the king's courts, to which every cauſe of conſequence was drawn. Indeed that age, and thoſe immediately ſucceeding it, were the aera of refinement and ſubtilty. There is an active principle in the human ſoul, that will ever be exerting it's faculties to the utmoſt ſtretch, in whatever employment, by the accidents of time and place, the general plan of education, or the cuſtoms and manners of the age and country, it may happen to find itſelf engaged. The northern conquerors of Europe were then emerging from the groſſeſt ignorance in point of literature; and thoſe, who had leiſure to cultivate it's progreſs, were ſuch only as were cloiſtered in monaſteries, the reſt being all ſoldiers or peaſants. And, unfortunately, the firſt rudiments of ſcience which they imbibed were thoſe of Ariſtotle's philoſophy, conveyed through the medium of his Arabian commentators; which were brought from the eaſt by the Saracens into Paleſtine and Spain, and tranſlated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a riſing ſtate, were thoſe of the nobleſt kind; the eſtabliſhment of religion, and the regulations of civil polity, yet having only ſuch tools to work with, their execution was trifling and flimſy. Both the divinity and the law of thoſe times were therefore frittered into logical diſtinctions, and drawn out into metaphyſical ſubtilties, with a ſkill moſt amazingly artificial; but which ſerves no other purpoſe, than to ſhew the vaſt powers of the human intellect, however vainly or prepoſterouſly employed. Hence law in particular, which (being intended for univerſal reception) ought to be a plain rule of action, became a ſcience of the greateſt intricacy; eſpecially when blended with the new refinements engrafted upon feodal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to ſuperſede (as they did in great meaſure) the more homely, but more intelligible, maxims of diſtributive juſtice among the Saxons. And, to ſay the truth, theſe

scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to it's pristine simplicity and vigour; and the endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions, and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A FOURTH innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. BUT the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feodal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

THE nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an ambitious,

bitious, and a politic prince to create. The consciences of men were enslaved by four ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived: who now imported from Rome for the first time the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battel. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfeu*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vasals to the crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights or *milites*: who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificancy happily retained, in their socage and burgage tenure,

some

ſome points of their antient freedom. All the reſt were villeins or bondmen.

FROM ſo complete and well-concerted a ſcheme of ſervility, it has been the work of generations for our anceſtors, to redeem themſelves and their poſterity into that ſtate of liberty, which we now enjoy: and which therefore is not to be looked upon as conſiſting of mere encroachments on the crown, and infringements on the prerogative, as ſome ſlaviſh and narrow-minded writers in the laſt century endeavoured to maintain: but as, in general, a gradual reſtoration of that antient conſtitution, whereof our Saxon forefathers had been unjuſtly deprived, partly by the policy, and partly by the force, of the Norman. How that reſtoration has, in a long ſeries of years, been ſtep by ſtep effected, I now proceed to inquire.

WILLIAM RUFUS proceeded on his father's plan, and in ſome points extended it; particularly with regard to the foreſt laws. But his brother and ſucceſſor, Henry the firſt, found it expedient, when firſt he came to the crown, to ingratiate himſelf with the people; by reſtoring (as our monkiſh hiſtorians tell us) the laws of king Edward the confeſſor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feodal tenures; but reſerved the tenures themſelves, for the ſame military purpoſes that his father introduced them. He alſo aboliſhed the *curfeu* [e]; for, though it is mentioned in our laws a full century afterwards [f], yet it is rather ſpoken of as a known *time* of night (ſo denominated from that abrogated uſage) than as a ſtill ſubſiſting cuſtom. There is extant a code of laws in his name, conſiſting partly of thoſe of the confeſſor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains ſome directions as to crimes and their puniſhments, (that of theft being made capital in his reign) and a few things relating to eſtates, parti-

[e] Spelm. *Codd. LL. W. I.* 288. *Hen. I.* 299. [f] *Stat. Civ. Lond.* 13 Edw. I.

ticularly as to the descent of lands: which being by the Saxon laws equally to all the sons, by the feodal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving however these ensigns of patronage, *conge d' eslire*, custody of the temporalties when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

THE usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

BY the time of king Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvil: which though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, it

it carries a manifest superiority[g]. Throughout his reign also was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign, of Henry the second, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The constitution of the parliament at Clarendon, *A. D.* 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere*; the king having divided the kingdom into six circuits (a little different from the present) and commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are said to have been then first invented: before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assise, or trial by special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 4. To this time must also be referred the introduction of escuage, or pecuniary com-

g Hal. Hist. C. L. 138.

mutation

mutation for perſonal military ſervice; which in proceſs of time was the parent of the antient ſubſidies granted to the crown by parliament, and the land tax of later times.

RICHARD the firſt, a brave and magnanimous prince, was a ſportſman as well as a ſoldier; and therefore enforced the foreſt laws with ſome rigour; which occaſioned many diſcontents among his people: though (according to Matthew Paris) he repealed the penalties of caſtration, loſs of eyes, and cutting off the hands and feet, before inflicted on ſuch as tranſgreſſed, in hunting; probably finding that their ſeverity prevented proſecutions. He alſo, when abroad, compoſed a body of naval laws at the iſle of Oleron: which are ſtill extant, and of high authority: for in his time we began again to diſcover, that (as an iſland) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the juſtices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croiſade againſt the Saracens in the holy land.

IN king John's time, and that of his ſon Henry the third, the rigours of the feodal tenures and the foreſt laws were ſo warmly kept up, that they occaſioned many inſurrections of the barons or principal feudatories: which at laſt had this effect, that firſt king John, and afterwards his ſon, conſented to the two famous charters of Engliſh liberties, *magna carta*, and *carta de foreſta*. Of theſe the latter was well calculated to redreſs many grievances, and encroachments of the crown, in the exertion of foreſt law: and the former confirmed many liberties of the church, and redreſſed many grievances incident to feodal tenures, of no ſmall moment at the time; though now, unleſs conſidered attentively and with this retroſpect, they ſeem but of trifling concern. But, beſides theſe feodal proviſions, care was alſo taken therein to protect the ſubject againſt other oppreſſions, then frequently ariſing from unreaſonable amercements, from illegal diſtreſſes

or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children: it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbad the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harrassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assises to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.

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HOWEVER, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here, than he ever had before enjoyed; which continued through the long reign of his son Henry the third: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still farther improvement in the method and regularity of the common law, especially in the point of pleadings[h]. Nor must it be forgotten, that the first traces which remain, of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III: and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. THE third commences with the reign of Edward the first; who hath justly been stiled our English Justinian. For in his time the law did receive so sudden a perfection, that sir Mathew Hale does not scruple to affirm[i], that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

IT would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as

h Hal. Hist. C. L. 156. i Ibid. 158.

they might not interfere with each other's proper business: to do which, they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution; though of considerably greater, than by the alteration of the value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect, of fines levied in the court of common pleas; though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are antienter than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit*: which was of signal benefit to a trading people: and, upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulph, in which all the landed property of the kingdom was in danger of being swallowed, by his re-iterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses.

14. He

14. He eſtabliſhed a new limitation of property by the creation of eſtates tail; concerning the good policy of which, modern times have however entertained a very different opinion. 15. He reduced all Wales to the ſubjection, not only of the crown, but in great meaſure of the laws, of England (which was thoroughly completed in the reign of Henry the eighth); and ſeems to have entertained a deſign of doing the like by Scotland, ſo as to have formed an entire and complete union of the iſland of Great Britain.

I MIGHT continue this catalogue much farther—but, upon the whole, we may obſerve, that the very ſcheme and model of the adminiſtration of common juſtice between party and party, was entirely ſettled by this king[k]; and has continued nearly the ſame, in all ſucceeding ages, to this day; abating ſome few alterations, which the humour or neceſſity of ſubſequent times hath occaſioned. The forms of writs, by which actions are commenced, were perfected in his reign, and eſtabliſhed as models for poſterity. The pleadings, conſequent upon the writs, were then ſhort, nervous, and perſpicuous; not intricate, verboſe, and formal. The legal treatiſes, written in his time, as Britton, Fleta, Hengham, and the reſt, are, for the moſt part, law at this day; or at leaſt *were* ſo, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *obſervation* of *magna carta*, rather than from it's *making* or *renewal*, in the days of his grandfather and father, that the liberty of Engliſhmen began again to rear it's head; though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his conſtitutions, than that from his time to that of Henry the eighth there happened very few, and thoſe not very conſiderable, alterations in the legal *forms* of proceedings. As to matter of *ſubſtance:* the old Gothic powers of electing the principal ſubordinate magiſtrates, the ſheriffs, and conſer-

k Hal. Hiſt. C. L. 162.

vators of the peace, were taken from the people in the reigns of Edward II and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have assumed it's present form; by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *praemunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

FROM this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure for farther

juridical

juridical improvement: "*nam silent leges inter arma.*"—And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

IN the reign of king Henry the seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign, was that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assises and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. The benefit of clergy (which so often intervened to stop attainders and save the inheritance) was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign,

introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, *viz.* the reformation of religion, under Henry the eighth, and his children; which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the crown restored to it's supremacy over spiritual men and causes, and the patronage of bishopricks being once more indisputably vested in the king. And, had the spiritual courts been at this time re-united to the civil, we should have seen the old Saxon constitution with regard to *ecclesiastical* polity completely restored.

With regard also to our *civil* polity, the statute of wills, and the statute of uses, (both passed in the reign of this prince) made a great alteration as to property: the former, by allowing the *devise* of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having it's full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in it's infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, (which protected estates for years from being destroyed by the reversioner) a remarkable alteration took place in the mode of conveyancing: the antient assurance by feoffment and livery upon the land being now very seldom practised, since the more easy and more private invention of transferring property, by secret conveyances to uses, and long terms of years being now continually created in mortgages

and

and family ſettlements, which may be moulded to a thouſand uſeful purpoſes by the ingenuity of an able artiſt.

THE farther attacks in this reign upon the immunity of eſtates-tail, which reduced them to little more than the conditional fees at the common law, before the paſſing of the ſtatute *de donis;* the eſtabliſhment of recognizances in the nature of a ſtatute-ſtaple, for facilitating the raiſing of money upon landed ſecurity; and the introduction of the bankrupt laws, as well for the puniſhment of the fraudulent, as the relief of the unfortunate, trader; all theſe were capital alterations of our legal polity, and highly convenient to that character, which the Engliſh began now to re-aſſume, of a great commercial people. The incorporation of Wales with England, and the more uniform adminiſtration of juſtice, by deſtroying ſome counties palatine, and abridging the unreaſonable privileges of ſuch as remained, added dignity and ſtrength to the monarchy: and, together with the numerous improvements before obſerved upon, and the redreſs of many grievances and oppreſſions which had been introduced by his father, will ever make the adminiſtration of Henry VIII a very diſtinguiſhed aera in the annals of juridical hiſtory.

IT muſt be however remarked, that (particularly in his later years) the royal prerogative was then ſtrained to a very tyrannical and oppreſſive height; and, what was the worſt circumſtance, it's encroachments were eſtabliſhed by law, under the ſanction of thoſe puſillanimous parliaments, one of which to it's eternal diſgrace paſſed a ſtatute, whereby it was enacted that the king's proclamations ſhould have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treaſons, which were ſlightly touched upon in a former chapter [1]. Happily for the nation, this arbitrary reign was ſucceeded by the minority of an amiable prince; during the ſhort ſunſhine of which, great part of theſe extravagant laws were repealed. And, to do juſtice to the ſhorter reign of queen Mary,

[1] See pag. 86.

many salutary and popular laws, in civil matters, were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well-concerted schemes for effecting which, were (through the providence of God) defeated by the seasonable accession of queen Elizabeth.

THE religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis; (though obliged in their infancy to be guarded, against papists and other non-conformists, by laws of too sanguinary a nature) the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and cloathing of millions; by affording them the means (with proper industry) to feed and to cloath themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

How-

HOWEVER, considering the reign of quee had acquired, a great and political view, we have no reason ns or oppres- subsequent alterations in the English constit exchequer, though in general she was a wise and excellent p being freed loved her people; though in her time trade flouri mediately increased, the laws were duly administered, the n preroga- respected abroad, and the people happy at home; uch less increase of the power of the star-chamber, and the weight of the high commission court in matters ecclesiastical, years the work of her reign. She also kept her parliaments atest very awful distance: and in many particulars she, at ti ath would carry the prerogative as high as her most arbitrary p d decessors. It is true, she very seldom exerted this preroga- tive, so as to oppress individuals; but still she had it to exert; and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to shew, that these were not those golden days of genuine liberty that we formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behaviour, as in the limitted power, of the sovereign.

THE great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced it's power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feodal lord, being usually some powerful baron, some opulent abbey,

many salutary … gh a notion of general
under her ad … d the whole consti-
people to th … ral equality, and
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… by the violence of a Cade

TH … ce been applauded, with a zeal
even … en softened and recommended by
obl … eration, and the arguments of a Sid-
ot … Milton.

… ing, by the invention of printing and the
… gious reformation, began to be universally diffe-
… en trade and navigation were suddenly carried to
… g extent, by the use of the compass and the conse-
… iscovery of the Indies; the minds of men, thus en-
… ened by science and enlarged by observation and travel, … gan to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves) and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expences: to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the com-

5 mons

mons were not yet ſenſible of the ſtrength they had acquired, nor urged to examine it's extent by new burthens or oppreſſive taxations, during the ſudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the inſolence and tyranny of the orders more immediately above them, they never dreamed of oppoſing the prerogative, to which they had been ſo little accuſtomed; much leſs of taking the lead in oppoſition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greateſt deſpotiſm, that have been known in this iſland ſince the death of William the Norman: the prerogative, as it then ſtood by common law, (and much more when extended by act of parliament) being too large to be endured in a land of liberty.

QUEEN Elizabeth, and the intermediate princes of the Tudor line, had almoſt the ſame legal powers, and ſometimes exerted them as roughly, as ther father king Henry the eighth. But the critical ſituation of that princeſs with regard to her legitimacy, her religion, her enmity with Spain, and her jealouſy of the queen of Scots, occaſioned greater caution in her conduct. She probably, or her able adviſers, had penetration enough to diſcern how the power of the kingdom had gradually ſhifted it's channel, and wiſdom enough not to provoke the commons to diſcover and feel their ſtrength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown aſide, but only to anſwer ſome important purpoſe: and, though the royal treaſury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, ſhe aſked for ſupplies with ſuch moderation, and managed them with ſo much oeconomy, that the commons were happy in obliging her. Such, in ſhort, were her circumſtances, her neceſſities, her wiſdom, and her good diſpoſition, that never did a prince ſo long and ſo entirely, for the ſpace of half a century together, reign in the affections of the people.

On the acceſſion of king James I, no new degree of royal power was added to, or exerciſed by, him: but ſuch a ſceptre was too weighty to be wielded by ſuch a hand. The unreaſonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occaſions, and the claim of a more abſolute power inherent in the kingly office than had ever been carried into practice, ſoon awakened the ſleeping lion. The people heard with aſtoniſhment doctrines preached from the throne and the pulpit, ſubverſive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciouſly ſupported: and common reaſon aſſured them, that, if it were of human origin, no conſtitution could eſtabliſh it without power of revocation, no precedent could ſanctify, no length of time could confirm it. The leaders felt the pulſe of the nation, and found they had ability as well as inclination to reſiſt it: and accordingly reſiſted and oppoſed it, whenever the puſillanimous temper of the reigning monarch had courage to put it to the trial; and they gained ſome little victories in the caſes of concealments, monopolies, and the diſpenſing power. In the mean time, very little was done for the improvement of private juſtice, except the abolition of ſanctuaries, and the extenſion of the bankrupt laws, the limitation of ſuits and actions, and the regulating of informations upon penal ſtatutes. For I cannot claſs the laws againſt witchcraft and conjuration under the head of improvements; nor did the diſpute between lord Elleſmere and ſir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of juſtice.

Indeed when Charles the firſt ſucceeded to the crown of his father, and attempted to revive ſome enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the ſubject, the arbitrary impriſonments for refuſal, the exertion of martial law in time of peace, and other domeſtic grievances, clouded the morning of that

misguided

misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowleged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commission courts was also extremely great; though their usurped authority was still greater. And, if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given: for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feodal tenures: though it must be acknowleged that these concessions were not made with so good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befal a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed therefore with the success they had gained, fired with resentment for past oppressions,

and dreading the consequences if the king should regain his power, the popular leaders (who in all ages have called themselves the *people*) began to grow insolent and ungovernable: their insolence soon rendered them desperate: and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I PASS by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of feodal tenures, the act of navigation, and some others) were adopted in the

V. FIFTH period, which I am next to mention, *viz.* after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, and with it our antient constitution, deserves no commendation from posterity, yet in his reign, (wicked, sanguinary, and turbulent as it was) the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since it's total abolition at the conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property and persons, form a second *magna carta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriances of the feodal system; but the statute of Charles the second extirpated all it's

slaveries;

ſlaveries; except perhaps in copyhold tenure; and there alſo they are now in great meaſure enervated by gradual cuſtom, and the interpoſition of our courts of juſtice. *Magna Carta* only, in general terms, declared, that no man ſhall be impriſoned contrary to law: the *habeas corpus* act points him out effectual means, as well to releaſe himſelf, though committed even by the king in council, as to puniſh all thoſe who ſhall thus unconſtitutionally miſuſe him.

To theſe I may add the abolition of the prerogatives of purveyance and pre-emption; the ſtatute for holding triennial parliaments; the teſt and corporation acts, which ſecure both our civil and religious liberties; the abolition of the writ *de haeretico comburendo;* the ſtatute of frauds and perjuries, a great and neceſſary ſecurity to private property; the ſtatute for diſtribution of inteſtates' eſtates; and that of amendments and *jeofails*, which cut off thoſe ſuperfluous niceties which ſo long had diſgraced our courts; together with many other wholeſome acts that were paſſed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewiſe conſider the freedom from taxes and armies which the ſubject then enjoyed, will be ſufficient to demonſtrate this truth, "that the con-"ſtitution of England had arrived to it's full vigour, and "the true balance between liberty and prerogative was hap-"pily eſtabliſhed by *law*, in the reign of king Charles the "ſecond."

IT is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What ſeems inconteſtable is this, that *by the law*[m], as it then ſtood, (notwithſtanding ſome invidious, nay dangerous, branches of the prerogative have ſince been lopped

[m] The point of time at which I would chuſe to fix this *theoretical* perfection of our public law, is the year 1679; after the *habeas corpus* act was paſſed, and that for licenſing the preſs had expired: though the years which immediately followed it were times of great *practical* oppreſſion.

off,

off, and the rest more clearly defined) the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprize and his throne together. Which introduces us to the last period of our legal history; *viz.*

VI. FROM the revolution in 1688 to the present time. In this period many laws have passed; as the bill of rights, the toleration act, the act of settlement with it's conditions, the act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons: have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow-peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and nominally,

nally, reduced the ſtrength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the oppoſite ſcale (what perhaps the immoderate reduction of the antient prerogative may have rendered in ſome degree neceſſary) the vaſt acquiſition of force, ariſing from the riot-act, and the annual expedience of a ſtanding army; and the vaſt acquiſition of perſonal attachment, ariſing from the magnitude of the national debt, and the manner of levying thoſe yearly millions that are appropriated to pay the intereſt; we ſhall find that the crown has, gradually and imperceptibly gained almoſt as much in influence, as it has apparently loſt in prerogative.

THE chief alterations of moment (for the time would fail me to deſcend to *minutiae*) in the adminiſtration of private juſtice during this period, are the ſolemn recognition of the law of nations with reſpect to the rights of embaſſadors: the cutting off, by the ſtatute for the amendment of the law, a vaſt number of excreſcences, that in proceſs of time had ſprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulations of trials by jury, and the admitting witneſſes for priſoners upon oath: the farther reſtraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine fort et dure*: the extenſion of the benefit of clergy, by aboliſhing the pedantic criterion of reading: the counterbalance to this mercy, by the vaſt increaſe of capital puniſhment: the new and effectual methods for the ſpeedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and eſtabliſhment of paper credit, by indorſements upon bills and notes, which have ſhewn the legal poſſibility and convenience (which our anceſtors ſo long doubted) of aſſigning a *choſe in action*: the tranſlation of all legal proceedings into the Engliſh language: the erection of courts of conſcience for recovering ſmall debts, and (which is much the better plan) the reformation of county courts: the great ſyſtem of marine juriſprudence,

 of

of which the foundations have been laid, by clearly developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases: and, lastly, the liberality of sentiment, which (though late) has now taken possession of our courts of common law, and induced them to adopt (where facts can be clearly ascertained) the same principles of redress as have prevailed in our courts of equity, from the time that lord Nottingham presided there; and this, not only where specially impowered by particular statutes, (as in the case of bonds, mortgages, and set-offs) but by extending the remedial influence of the equitable writ of trespass on the case, according to it's primitive institution by king Edward the first, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations that have happened with respect to private justice, in the course of the present century.

THUS therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time. We have seen, in the course of our inquiries, in this and the former volumes, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, since: that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the restoration of king Charles, nor fully

and explicitly acknowleged and defined, till the aera of the happy revolution. Of a conſtitution ſo wiſely contrived, ſo ſtrongly raiſed, and ſo highly finiſhed, it is hard to ſpeak with that praiſe, which is juſtly and ſeverely it's due :—the thorough and attentive contemplation of it will furniſh it's beſt panegyric. It hath been the endeavour of theſe commentaries, however the execution may have ſucceeded, to examine it's ſolid foundations, to mark out it's extenſive plan, to explain the uſe and diſtribution of it's parts, and from the harmonious concurrence of thoſe ſeveral parts to demonſtrate the elegant proportion of the whole. We have taken occaſion to admire at every turn the noble monuments of antient ſimplicity, and the more curious refinements of modern art. Nor have it's faults been concealed from view; for faults it has, leſt we ſhould be tempted to think it of more than human ſtructure: defects, chiefly ariſing from the decays of time, or the rage of unſkilful improvements in later ages. To ſuſtain, to repair, to beautify this noble pile, is a charge intruſted principally to the nobility, and ſuch gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY of BRITAIN is a duty which they owe to themſelves, who enjoy it; to their anceſtors, who tranſmitted it down; and to their poſterity, who will claim at their hands this, the beſt birthright, and nobleſt inheritance of mankind.

THE END.

APPENDIX.

§. 1. Record *of an Indictment and Conviction of* Murder, *at the Assises.*

Warwickshire, to wit, } **Be it remembered**, that at the general session of the lord the king of *oyer* and *terminer* holden at Warwick in and for the said county of Warwick, on Friday the twelfth day of March in the second year of the reign of the lord George the third, now king of Great Britain, before sir Michael Foster, knight, one of the justices of the said lord the king assigned to hold pleas before the king himself, sir Edward Clive, knight, one of the justices of the said lord the king, of his court of common bench, and others their fellows, justices of the said lord the king, assigned by letters patent of the said lord the king, under his great seal of Great Britain, made to them the aforesaid justices and others, and any two or more of them, (whereof one of them the said sir Michael Foster and sir Edward Clive, the said lord the king would have to be one) to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the monies of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits,

Session of *oyer* and *terminer*.

Commission of

deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessories of the same, within the county aforesaid, as well within liberties as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters patent of the said lord the king specified; the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said lord the king, assigned to hear and determine divers felonies, trespasses, and other misdemesnors committed within the county aforesaid, by the oath of sir James Thomson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, esquires, good and lawful men of the county aforesaid, then and there impanelled, sworn, and charged to inquire for the said lord the king and for the body of the said county, it is presented, that Peter Hunt, late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of March in the said second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Peter Hunt with a certain drawn sword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him the said Samuel Collins then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the said Samuel Collins, then and there, with the sword drawn as aforesaid, in and upon the left side of the belly of him the said Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid in the said county of Warwick, from the said fifth day of March in the year aforesaid until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought,

oyer and terminer, and of the peace.

Grand jury.

Indictment.

thought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity. Whereupon the sheriff of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep, to answer to the felony and murder whereof he stands indicted. Which said indictment the said justices of the lord the king abovenamed, afterwards, to wit, at the delivery of the gaol of the said lord the king, holden at Warwick in and for the county aforesaid, on Friday the sixth day of August in the said second year of the reign of the said lord the king, before the right honourable William lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, sir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said gaol of the county aforesaid of the prisoners therein being, by their proper hands to deliver here in court of record in form of the law to be determined. And afterwards, to wit, at the same delivery of the gaol of the said lord the king of his county aforesaid, on the said Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king last abovenamed and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid, (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed) being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed: And forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith, that he is not guilty thereof; and thereof for good and evil he puts himself upon the country: And John Blencowe, esquire, clerk of the assises for the county aforesaid, who prosecutes for the said lord the king in this behalf, doth the like: Therefore let a jury thereupon here immediately come before the said justices of the lord the king last abovementioned, and others their fellows aforesaid, of free and lawful men of the neighbourhood of the said parish of Lighthorne in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognize upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose impannelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes,

Capias.

Session of gaol-delivery.

Arraignment.

Plea; not guilty.

Issue.

Venire.

Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who being elected, tried, and sworn, to speak the truth of and concerning the premises, upon their oath say, **that** the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt at the time of committing the said felony and murder, or at any time since to this time, had not nor hath any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere, to the knowlege of the said jurors. And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who nothing farther saith, unless as he before had said. **Whereupon**, all and singular the premises being seen, and by the said justices here fully understood, **it is considered** by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the said county of Warwick from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be dissected and anatomized.

Verdict; guilty of *murder*. Judgment of death, and dissection.

§. 2. *Conviction of* Manslaughter.

——— upon their oath say, that the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time, to the knowlege of the said jurors. And immediately it is demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: **who** saith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. **Whereupon**, all and singular the premises being seen, and by the said justices here fully understood, **it is considered** by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute.

Verdict;—not guilty of *murder*; guilty of *manslaughter*. Clergy prayed. Judgment to be burned in the hand, and delivered.

§. 3. *Entry of a Trial* instanter *in the Court of King's Bench, upon a collateral Issue; and Rule of Court for Execution thereon.*

Michaelmas term, in the sixth year of the reign of king George the third.

Kent: The King against Thomas Rogers. } The prisoner at the bar being brought into this court in custody of the sheriff of the county of Sussex, by virtue of his majesty's writ of *habeas corpus*, it is ordered that the said writ and the return thereto be filed. And it appearing by a certain record of attainder, which hath been removed into this court by his majesty's writ of *certiorari*, that the prisoner at the bar stands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the said prisoner at the bar having heard the record of the said attainder now read to him, is now asked by the court here, what he hath to say for himself, why the Court here should not proceed to award execution against him upon the said attainder. He for plea saith, that he is not the same Thomas Rogers in the said record of attainder, named, and against whom judgment was pronounced: and this he is ready to verify and prove, &c. To which said plea the honourable Charles Yorke, esquire, attorney-general of our present sovereign lord the king, who for our said lord the king in this behalf prosecuteth, being now present here in court, and having heard what the said prisoner at the bar hath now alleged, for our said lord the king by way of reply saith, that the said prisoner now here at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the country; and the said prisoner at the bar doth the like: Therefore let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the said prisoner, to try upon their oath, whether the said prisoner at the bar be the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, or not: because as well the said Charles Yorke, esquire, attorney-general of our said lord the king, who for our said lord the king in this behalf prosecutes, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. And immediately thereupon the said jury come here into court; and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, and having heard the said record read to them, do say upon their oath,

Habeas corpus. Record of attainder read; for felony and robbery. Prisoner asked what he can say in bar of execution. Plea; not the same person. Replication; averring that he is. Issue joined. *Venire* awarded *instanter*. Jury sworn.

oath, that the ſaid priſoner at the bar is the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was ſo pronounced as aforeſaid, in manner and form as the ſaid attorney-general hath by his ſaid replication to the ſaid plea of the ſaid priſoner now here at the bar alleged. And hereupon the ſaid attorney-general on behalf of our ſaid lord the king now prayeth, that the court here would proceed to award execution againſt him the ſaid Thomas Rogers upon the ſaid attainder. Whereupon, all and ſingular the premiſes being now ſeen and fully underſtood by the court here, it is ordered by the court here, that execution be done upon the ſaid priſoner at the bar for the ſaid felony in purſuance of the ſaid judgment, according to due form of law: And it is laſtly ordered, that he the ſaid Thomas Rogers, the priſoner at the bar, be now committed to the cuſtody of the ſheriff of the county of Kent (now alſo preſent here in court) for the purpoſe aforeſaid; and that the ſaid ſheriff of Kent do execution upon the ſaid defendant the priſoner at the bar for the ſaid felony, in purſuance of the ſaid judgment, according to due form of law.

Verdict; that he is the ſame.

Award of execution.

On the motion of Mr. Attorney General.

By the Court.

§. 4. *Warrant of Execution on Judgment of Death, at the general Gaol-delivery in* London *and* Middleſex.

London and Middleſex.	To the ſheriffs of the city of London; and to the ſheriff of the county of Middleſex: and to the keeper of his majeſty's gaol of Newgate.

Whereas at the ſeſſion of gaol delivery of Newgate, for the city of London and county of Middleſex, holden at Juſtice Hall in the Old Bailey, on the nineteenth day of October laſt, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received ſentence of death for the reſpective offences in their ſeveral indictments mentioned; Now it is hereby ordered, that execution of the ſaid ſentence be made and done upon them the ſaid Patrick Mahony and Roger Jones, on Wedneſday the ninth day of this inſtant month of November at the uſual place of execution. And it is his majeſty's command, that execution of the ſaid ſentence upon them the ſaid Charles King and Mary Smith be reſpited, until his majeſty's pleaſure touching them be farther known.

Given under my hand and ſeal this fourth day of November, one thouſand ſeven hundred and ſixty-eight.

James Eyre, Recorder. L. S.

§. 5.

§. 5. *Writ of Execution upon a Judgment of* Murder, *before the* King *in* Parliament.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriffs of London and sheriff of Middlesex, greeting. Whereas Lawrence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present parliament; and the said Lawrence earl Ferrers, viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence earl Ferrers, viscount Tamworth, hath before us in our said parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our said parliament, that the said Lawrence earl Ferrers, viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by these presents strictly command you, that upon Monday the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence earl Ferrers, viscount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded) into your custody you then and there receive: and him, in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn: and that you do cause execution to be done upon the said Lawrence earl Ferrers, viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. Witness ourself at Westminster the second day of May, in the thirty-third year of our reign.

Yorke and Yorke.

THE END.

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